



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

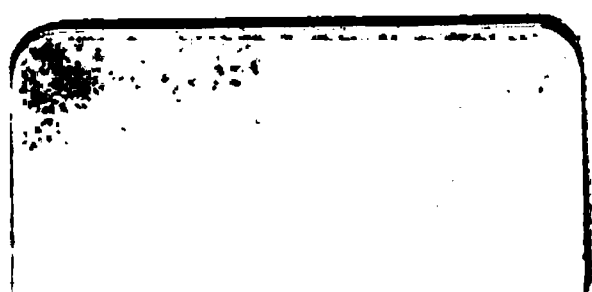
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



CASES

DETERMINED IN THE

UNITED STATES CIRCUIT COURTS

FOR THE EIGHTH CIRCUIT.

REPORTED BY

JOHN F. DILLON,

THE CIRCUIT JUDGE.

"WITH AN ENLIGHTENED BAR AND AN INTELLIGENT PEOPLE, THE MERE AUTHORITY OF THE BENCH WILL CEASE TO HAVE ANY WEIGHT AT ALL, IF IT BE UNACCOMPANIED WITH ARGUMENT AND EXPLANATION."—*Lord Brougham.*

VOL. I.
SECOND EDITION.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1885.

Entered according to the act of Congress, in the year 1871,
By JOHN F. DILLON,
In the Office of the Librarian of Congress, at Washington.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
AND DEPARTMENT.

DEDICATION.

TO THE HONORABLE

GEORGE G. WRIGHT, LL. D.

AFTER YEARS OF LABORIOUS SERVICE TOGETHER, WE LEFT THE SUPREME
BENCH OF OUR STATE NEAR THE SAME TIME: YOU FOR THE SENATE,
AND I FOR THE CIRCUIT. I SHALL NEVER CEASE TO REGARD MY
LONG JUDICIAL ASSOCIATION WITH YOU AS AMONG THE MOST
FORTUNATE CIRCUMSTANCES OF MY LIFE. IT HAS SEEMED
TO ME A PLEASING THOUGHT THAT I COULD CONTINUE
TO CONNECT OUR NAMES TOGETHER UPON THE
SAME LEGAL PAGE, BY DEDICATING TO YOU
THE FIRST FRUITS GATHERED, SINCE
OUR SEPARATION, FROM MY NEW
FIELD OF LABOR.

JOHN F. DILLON.

PREFACE.

THIS is the first volume of a proposed regular series of reports for the EIGHTH CIRCUIT.

No judicial tribunal in England or America has conferred upon it powers so comprehensive and various as those of the circuit courts of the United States. Their jurisdiction is original and appellate, civil and criminal. They are constantly adjudicating cases which are elsewhere intrusted to distinct tribunals. Nearly every question of a nature to come before the Queen's Bench, the Common Pleas, the Chancery, the Exchequer, the Admiralty, or the Bankruptcy Courts of Great Britain, may, in an original or appellate form, come before the circuit courts of the United States. Besides, in a great variety of cases arising under the constitution and laws of the general government, they have original jurisdiction, exclusive of all other courts.

The reports of cases determined by tribunals to which are confided powers so diversified and important, possess a character, and ought to have a value, distinctively their own.

In MR. WOOLWORTH'S reports, recently published, are collected the hitherto scattered decisions of MR. JUSTICE MILLER, since he was assigned to this circuit, down to the date of the reorganization of the courts by the Act of Congress of April 10, 1869, which provided for the appointment, in each of the existing circuits, of a circuit judge, to whom, within the circuit, is given the same powers and jurisdiction which are possessed by the justice of the supreme court allotted to it.

I cannot refrain from here expressing my sense of the value of MR. WOOLWORTH'S admirable volume. The cases are nearly all new or important, and the learning and industry of the reporter are only less marked than the ability and intellectual vigor of the judge.

Regularly there will be included in these reports only such of

the current cases as are believed to be important in principle, or useful to the practitioner in the federal courts. Most of the States aid the publication of their law reports; and to some extent this is done by Congress, in respect to the decisions of the supreme court of the United States. But the reports of the circuits must stand on their unassisted merits, and since their publication is attended with much labor and little reward, no temptation exists to multiply them too rapidly by reporting useless cases.

There is to some extent a distinctive character in the litigation of the different circuits. This is manifestly true of the eighth, comprising six large, populous, and growing States: Minnesota, Iowa, Missouri, Arkansas, Kansas, and Nebraska. Within this circuit are large commercial centers, giving rise to characteristic controversies. Bounded as the circuit is, for nearly two thousand miles on the Mississippi, and traversed by the Missouri and other great water-courses, there originates on this vast inland navigation a large amount of admiralty business, of a character somewhat different from that in circuits bordering on the great lakes or the high seas. This circuit, too, it should be added, extends to Lake Superior, whose growing commerce is already furnishing the federal courts with admiralty causes.

Four districts in the circuit stretch so far westward that they embrace various Indian tribes, sustaining different treaty relations to the general government, and peculiar relations to the States, within whose boundaries they remain; from whence we have here litigation of an anomalous, yet most interesting nature. The circuit embraces also a large amount of the public domain, some of which has been granted to railway companies, and to different States, for specified objects; but much of which is yet subject to the various land laws of the United States, including the beneficent and salutary Pre-emption and Homestead acts. These circumstances, too, leave their impress upon controversies that find their way into the national courts within the circuit.

Besides which, it has its share of cases in Bankruptcy, and those relating to Railway, Insurance, Revenue, Commercial, and Corporation law.

A field so vast, and one so rich in the variety and character of the materials which, with proper attention, it can be made to contribute to the building up of a symmetrical system of national jurisprudence, ought, surely, not to be neglected. Considerations like these, which the reporter has persuaded himself will meet with the approving judgment of an enlightened profession, have moved him to attempt to do his part in this useful work; and to preserve, in an authentic form, for the use of others, the results of some of the labors of his co-workers and himself. The chief requirements of a Law Report—a clear but not prolix or redundant statement, perspicuous head-notes, and a full but not diffuse index—the reporter has endeavored to meet in the preparation of this volume. What appears in the head-notes is intended to be the statement of a point, or principle, involved in the case and actually decided, unless the contrary be therein indicated.

A few cases, involving the construction of State statutes, have been included in the volume; but for this a reason existed, either in the fact that they were upon important subjects, or because the local statute had not been settled by State adjudication. To some of the cases notes have been added by the reporter, who trusts they will be regarded as worth the brief space they occupy.

J. F. D.

Davenport, Iowa, 1871.

JUDGES
OF THE
UNITED STATES CIRCUIT COURTS,
FOR THE EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, LL. D., Supreme Court Justice assigned to the Circuit.

HON. JOHN F. DILLON, LL. D., Circuit Judge for the Circuit.

DISTRICT JUDGES.

HON. RENSSELAER, R. NELSON, Minnesota.

HON. JAMES M. LOVE, Iowa.

HON. SAMUEL TREAT, Eastern District Missouri.

HON. ARNOLD KREKEL, Western District Missouri.

HON. ELMER S. DUNDY, Nebraska.

HON. MARK W. DELAHAY, Kansas.

HON. HENRY C. CALDWELL, Eastern District Arkansas.

HON. WILLIAM STOREY, Western District Arkansas.

STATUTES CONSTRUED

1789. — Act of September 24, 1789 (1 U. S. Stats.), "Judiciary Act"	1,
	73, 119, 301, 343, 367
1832. — Act of April 20, 1832 (4 U. S. Stats. 505), "Hot Springs Reservation."..	213
1836. — Act of July 4, 1836 (5 U. S. Stats. 121), "Patents for Inventions."	104
1840. — Act of July 20, 1840, (5 U. S. Stats. 394), "Jurors."	435
1841. — Act of September 4, 1841 (5 U. S. Stats. 453), "Pre-emption Act."	281
1854. — Act of July 17, 1854 (Minnesota Half Breed Tract)	455
1857. — Act of March 3, 1857 (11 U. S. Stats. 197), "Organizing the Federal Courts in Missouri."	1
1861. — Act of July 13, 1861 (12 U. S. Stats. 255), "As to the Rebellion."	372, 571
1861. — Act of August 5, 1861, "Direct Tax Act."	267
1862. — Act of July 1, 1862 (12 U. S. Stats. 489), "Incorporating Union Pacific Railroad Company."	314
1862. — Act of July 2, 1862 (12 U. S. Stats. 588, section 1), "Evidence."	66
1863. — Act of March 3, 1863 (12 U. S. Stats. 757), "As to Limitation of Certain Suits."	8
1864. — Act of March 15, 1864 (13 U. S. Stats.), "Sale of Liquor to Indians." . . .	451
1864. — Act of June 11, 1864 (13 U. S. Stats. 123), "As to the Effect of the Rebellion in Limiting Actions."	372
1864. — Act of July 2, 1864 (13 U. S. Stats. 351), "As to Competency of Parties as Witnesses."	66, 182, 422
1866. — Act of July 13, 1866 (14 U. S. Stats. 98), "Internal Revenue Act as to Removal of Spirits by Distillers."	49
1867. — Act of March 2, 1867 (14 U. S. Stats. 517), known as the "Bankrupt Law."	19, 24, 33, 40, 45, 108, 115, 141, 155, 158, 161, 164, 178, 203, 217, 303, 421, 453, 497, 544, 586.
1867. — Act of March 31, 1868 (14 U. S. Stats. 483), "Amendatory Internal Revenue Act."	49
1867. — Act of March 2, 1867 (14 Stats. 588), "As to Removal of Causes."	290, 299, 305
1868. — Act of March 31, 1868 (15 U. S. Stats. 58), "Amendatory Internal Revenue Act."	49
1868. — Act of July 20, 1868 (15 U. S. Stats. 123), "Direct Tax Act."	267
1868. — Act of July 20, 1868, "Interval Revenue," section 20.	586
1869. — Act of April 10, 1869 (16 U. S. Stats. 44), "Creating the Circuit Judge- ships."	1

CASES REPORTED.

	PAGE
Adams, Karrahoo v.....	344
Allen v. Massey.....	40
Allin v Robinson.....	119
Andrews v. Grave	108
Appleton v. Smith.....	202
Arnott v. Webb.....	362
 Babbitt v. Walbrun & Co.....	 19
Bailey v. Hannibal & St. Joseph Railroad.....	174
Bank (Hastings National), Hawkins v.....	458
Bank, Vanderhoof's Assignee v.....	476
Barlow v. Barner.....	418
Barner, Barlow v.....	418
Barrels Spirits One Hundred, United States v.....	49
Bartholew, Kingsing's Assignee v.....	155
Beale v. Railway Company.....	568
Bean v. Brookmire.....	24
Bean v. Brookmire & Rankin.....	151
Beecher v. Gillett.....	308
Beckerford, Bankrupt.....	45
Berry v. Fletcher, twice reported.....	66, 67
Boatman's Saving Institution, Darby's Trustees v.....	141
Brookmire, Bean v.....	24
Brookmire & Rankin, Bean v.....	151
Brown v. Hiatt.....	372
Brown v. Kennedy.....	392
Brown, O'Brien Co. v.....	588
Buckner v. Street.....	248
Burnes, Covington v.....	16
Burt, In re.....	489
 Case v. Douglas.....	 299
Central Bank, Patrick v.....	303
City Bank, Vanderhoof v.....	476
Clark v. Dick.....	8
Coffin, Sweeney v.....	73
Collins, Tenny v.....	66
Conrad, Hazlett v.....	79
Cooper, Preston v.....	589
County Treasurer, Lansing v.....	522
County, Brown v.....	588
Covington v. Burnes.....	16
Cowles, In re.....	440
Cribbs, Rison v.....	181
Crothers, Webster v.....	301

Darby's Trustees v. Boatman's Savings Institution.....	141
—— v. Lucas.....	164
Dick, Clark v.....	8
Dodd, Brown & Company, Giddings v.....	115
Douglas, Case v.....	299
Downing, In re.....	33
Drury v. Foster.....	460
Duluth, United States v.....	469
Dupas v. Wassell.....	213
Easley, Kelom v.....	281
Ex parte Forbes.....	363
Ex parte Schmeid.....	587
Fallen v. Railroad Company.....	121
Fauntleroy v. Hannibal.....	118
Filley, Wright v.....	171
Finlayson v. Railroad Company.....	579
Fletcher, Berry v., twice reported.....	66, 67
Flynn, United States v.....	451
Forbes, Ex parte.....	363
Foster, Drury v.....	460
Fredericks v. The McPorter.....	85
Gaffney's Assignee v. Signalgo.....	158
Garden Company v. Smith.....	305
Geib v. Insurance Company.....	443
Geib v. Enterprise Insurance Company.....	449
Giddings v. Dodd, Brown & Co.....	115
Gilchrist v. Little Rock.....	261
Gillett, Beecher v.....	308
Goldstein's Sureties, United States v.....	413
Graves, Andrews v.....	108
Hall, In re.....	586
Hannibal, Fauntleroy v.....	118
Hannibal & St. Joseph Railroad, Bailey v.....	174
Hanley, Triplett v.....	217
Hardy, The.....	460
Hastings National Bank, Hawkins v.....	453
Hastings Bank, Hawkins v.....	462
Hatch, Phillips v.....	571
Hawkins v. Hastings National Bank.....	453
Hawkins v. Hastings Bank.....	462
Hawthorne, United States v.....	422
Hazlett v. Conrad.....	79
Heaney, Markson v.....	497
Henderson, Claimant.....	49
Hiatt, Brown v.....	372
Hobson v. Markson.....	421
Hodge v. North Missouri Railroad Company.....	104
Holmes v. Sheridan.....	351
Home Insurance Company, Scott v.....	105
Home Insurance Company v. Stanchfield.....	424
Hostetter v. Vowinkle.....	829
Ingersoll, Perkins v.....	417
In re Beckerford.....	45

CASES REPORTED.

xv

In re Burt.....	439
In re Circuit Court Missouri Districts.....	1
In re Cowles.....	440
In re Downing, bankrupt....	38
In re Hall.....	586
In re Marvin, bankrupt.....	178
In re Richter.....	545
In re Thomas.....	420
Insurance Company, Partridge v.....	139
Insurance Company, Scott v.....	105
Insurance Company, Spratley v.....	392
Insurance Company v. Stanchfield.....	424
Insurance Company, Terry v.....	403
Insurance Company (International), Geib v.....	443
Insurance Company (Enterprise), Geib v.....	449
Insurance Company, Weide v.....	441
Karrahoo v. Adams.....	344
Kellom v. Easley.....	281
Kennedy, Brown v.....	392
King v. Wilson.....	555
Knapp, Rison v.....	186
Kinsing's Assignee v. Bartholew.....	155
Krutz, Spalding v.....	414
Lansing v. County Treasurer.....	522
Larriviere v. Madegan.....	455
Leavenworth, Ranlett v.....	263
Leavenworth, Railroad Company v.....	393
Lee County, Rogers v.....	529
Life Insurance Company, Partridge v.....	139
Life Insurance Company, Terry v.....	403
Lincoln County, Union Pacific Railroad Company v.....	314
Linkman v. Wilcox.....	161
Little Rock, Gilchrist v.....	261
Lowe, United States v.....	585
Loyhed, Phelps v.....	512
Lucas, Darby's Trustees v.....	164
Madegan, Larriviere v.....	455
Markson, Hobson v.....	421
Markson v. Heany.....	497
Martin v. Smith.....	85
Martin v. Toof et al.....	203
Marvin, In re.....	178
Massey, Allen v.....	40
Menzell v. Railroad Company.....	581
McBratney v. Usher.....	367
McPorter The, Fredericks v.....	85
Murphy v. Paynter.....	333
Muscatine v. Railroad Company.....	536
Nicholson, Osborn v.....	219
Nissley, United States v.....	586
North Missouri Railroad Company, Hodge v.....	104

O'Brien Co. v. Brown.....	588
Omaha City, Serrot v.....	312
Osborn v. Nicholson et al.....	219
Otoe County, Railroad Company v.....	338
Pacific Railroad Company v. Leavenworth.....	393
Patrick v. Central Bank.....	303
Partridge v. Life Insurance Company.....	139
Paynter, Murphy v.....	333
Peay, Schenck v.....	267
Perkins v. Ingersoll.....	417
Phelps v. Loyhed.....	512
Phillips v. Hatch.....	571
Preston v. Cooper.....	589
Purdy, Swope v.....	349
Railroad Company, Bailey v.....	174
Railroad Company, Beale v.....	568
Railroad Company, Fallen v.....	121
Railroad Company, Finlayson v.....	579
Railroad Company, Hodge v.....	104
Railroad Company v. Lincoln County.....	314
Railroad Company v. Otoe County.....	338
Railroad Company v. Leavenworth.....	393
Railroad Company, Muscatine v.....	536
Railroad Company, Menzell v.....	531
Ranlett v. Leavenworth.....	263
Richter, In re.....	545
Rison v. Cribbs.....	181
Rison v. Knapp.....	186
Rogers v. Lee County.....	529
Robinson, Allin v.....	119
Saine, Swope v.....	416
Sands v. Smith.....	290
Schenck v. Peay.....	267
Schmeid, Ex parte.....	587
Serrot v. Omaha.....	312
Sheridan, Holmes v.....	351
Signaigo, Gaffney's Assignee v..	158
Scott v. Home Insurance Company.....	105
Smith, Appleton v.....	202
Smith, Garden City Company v.....	305
Smith, Thompson v.....	458
Smith, Martin v.....	85
Smith, Sands v.....	290
Smith v. United States.....	212
Sohn v. Waterson.....	358
Spalding v. Kurtz.....	414
Spratley v. Hartford Insurance Company.....	292
Stanchfield, Insurance Company v.....	424
Ste. Genevieve, Welch v.....	130
Street, Buckner v.....	248
Sweeney v. Coffin.....	73
Swope v. Purdy.....	349
Swope v. Saine.....	416

CASES REPORTED.

xvii

Tenny v. Collins.....	66
Terry v. Life Insurance Company.....	403
Thomas, In re.....	420
Thompson v. Smith.....	458
Tobacco Factory, United States v.....	264
Toof et al., Martin v.....	203
Treasurer, Lansing v.....	522
Triplett v. Hanley et al.....	217
Union Pacific Railroad v. Lincoln County.....	814
United States v. Flynn.....	451
United States v. Goldstein's Sureties.....	413
United States v. Hawthorne.....	422
United States v. One Hundred Barrels, etc.....	49
United States v. Duluth.....	469
United States v. Lowe.....	585
United States v. Nissley..	586
United States v. Smith.....	212
United States v. Tobacco Factory.....	264
United States v. Van Fossen.....	406
United States v. Williams.....	485
United States v. Yellow Sun.....	271
Usher, McBratney v.....	367
Vanderhoof's Assignee v. City Bank.....	476
Van Fossen, United States v.....	406
Varrenne, Von Glahn v.....	515
Von Glahn v. Varrenne.....	515
Vowinkle, Hostetter v.....	329
Walbrun & Company, Babbitt v.....	19
Ware v. Water Power Company.....	465
Wassell, Dupas v.....	213
Waterson, Sohn v.....	358
Water Power Company, Ware v.....	465
Webb, Arnott v.....	362
Webster, Crothers v.....	301
Weide v. Insurance Company.....	441
Welch v. Ste. Genevieve.....	180
Wilcox, Linkman v.....	161
Williams, United States v.....	485
Wilson, King v.....	555
Wright v. Filley.....	171
Yellow Sun, United States v.....	271

REPORTS OF CASES.

DETERMINED IN

THE CIRCUIT COURT

OF THE

UNITED STATES

FOR THE

EIGHTH JUDICIAL CIRCUIT.

IN RE CIRCUIT COURT FOR THE DISTRICTS OF MISSOURI.

CIRCUIT COURTS—SCHEME OF ORGANIZATION—DISTRICTS OF MISSOURI.—The organization of the circuit court of the *districts of Missouri* is peculiar, and is provided for by the Act of March 3, 1857 (11 U. S. Stats. 197).

Id.—By this act it was provided that Missouri should be divided into two districts, with but one circuit court for both, and that the *two* judges of the district court should sit in the circuit court. *Held*, that the Act of April 10, 1869 (16 U. S. Stats. 44), creating the office and providing for the appointment of *circuit judges*, and declaring who should hold the circuit courts, did not exclude either of the district judges from the right still to sit in the circuit court.

Id.—The scheme of the organization of the national courts by the judiciary act and the purpose of Congress in creating the new circuit judgeships, commented on by the circuit judge.

Before DILLON, J., TREAT, J., and KREKEL, J.

DILLON, *Circuit Judge*.—Respecting the constitution of this court, an important question has been started, which it is necessary to determine at the outset of this, the first ^[3] regular term

I. DILL.—1.

which has been held since the taking effect of the Act of April 10, 1869, entitled "An Act to amend the Judicial System of the United States" (16 U. S. Stats. 44), and which modified the scheme of the national judicial tribunals, by providing for the appointment, in each circuit, of a judge called and commissioned as the "circuit judge."

That question is: *What judges have the legal right to sit in this court? or more specifically stated, have both the district judges, or has either of them, this right?*

The answer to this inquiry depends on the effect of the above-mentioned Act of 1869, upon the prior Act of Congress of March 3, 1857, dividing the State of Missouri into two judicial districts and making special provisions, of an unusual character, as to the constitution of the United States circuit court therein. (11 U. S. Stats. 197.)

Prior to the year 1857 the national courts in Missouri were organized on the usual plan, that is, the State constituted one district, having a district court, and a circuit court for the district, held by the supreme justice, sitting with the district judge, or by either, in the absence of the other; but in that year the Act of March 3d, before referred to, was passed. By it the State was divided into two districts, the eastern and western, each district to have a judge and a district court of its own, the court for the eastern district to be held at St. Louis, and that for the western district at Jefferson City. Before this division of the State, the circuit court had always been holden in the city of St. Louis.

Respecting the circuit court, the tenth section of the Act of 1857 made the following peculiar provisions which it is necessary to notice with particularity. This section is in these words:—

"The circuit court of the United States in and for the present district of Missouri shall be held at the same times (the first Mondays of April and October in each year) and place (St. Louis) as heretofore; shall retain jurisdiction of all matters now pending therein, and shall have and exercise^[8] the same original jurisdiction *in said State* as is vested in the several circuit courts of the United States, as organized under existing laws; and shall also have and exercise the same *appellate jurisdiction*

over the district courts of the United States for said eastern and western districts of Missouri, as by existing laws is vested in the several circuit courts of the United States over the district courts of the United States, in their respective circuits. The said circuit court shall be called the circuit court in and for the districts of Missouri, and shall be composed of the justice of the supreme court assigned to said circuit, and the two judges of the eastern and western districts of Missouri; but may be held by one or more of said three judges "in the absence of the remainder."

Then follows a provision that in the circuit court the district judge shall not sit in appeals from his own district, and certain regulations respecting a division of opinion, etc., not essential to be now specially noticed.

It will be seen that instead of the usual mode of providing a circuit court for each district, only one such court was established for both, but it was provided that each of the district judges should sit therein, and the court should continue to be held in this city.

If the Act of 1869 does not repeal or modify the Act of 1857, it is clear that the two judges of the United States district courts may continue, as heretofore, to sit in this court as members of it.

It is to be observed that the Act of 1869 makes no *express* repeal of the Act of 1857. If there is any repeal it is by implication: therefore, on plain, familiar, and acknowledged principles of construction, both acts are to stand and both are to be considered in force except so far as the latter act is necessarily inconsistent with the former one.

It is now proper to notice the Act of 1869. Section two enacts as follows:—

"For each of the existing nine judicial circuits there shall [4] be appointed a circuit judge, who shall reside in his circuit, and possess the same power and jurisdiction therein as the justice of the supreme court allotted to the circuit. *The circuit courts in each circuit shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by the justice of the supreme court and circuit judge sitting together, in which*

case the justice of the supreme court shall preside, or in the absence of either of them, by the other (who shall preside), and the district judge."

How far, then, are the provisions of the two acts in conflict? Not as to the supreme justice, for by both his right to sit in the court is expressly given. By the prior act no such officer as the "circuit judge" was given the right to sit, but this right is conferred by the Act of 1869. This necessarily changed, to this extent, the provisions of the Act of 1857 as to the constitution of the circuit court, but this change did not operate to displace those who had previously the right to sit there, but simply to confer this right upon the newly created circuit judge.

By the Act of 1857 it was enacted that the two district judges should be members of the court, and that any one of the three judges might hold it in the absence of the others. And so by the Act of 1869 "the district judge of the district" may hold the circuit court alone if the other judges are absent.

Manifestly, then, it was not the intention of Congress that there should, in any case, be a circuit court in which no district judge should be entitled to sit, for it is expressly provided that the district judge may sit alone or in connection with the supreme justice or the circuit judge.

No construction is admissible which would exclude *both* of the district judges from seats in the court, for the plain reason that such a result would frustrate the clearly declared legislative will. To my mind it is plain that if both the ^[5] judges of the eastern and western districts of this State may not sit in this court, neither can.

There is no act of Congress providing a distinct circuit court for each of the two districts. The statute of 1857 enacts that the "court shall be called the circuit court for the *districts* of Missouri." This act is not repealed. It is still the constituent statute of this court. It is by virtue of it that the court is authorized to sit here at all.

What superior right has the judge of the eastern district to that of the judge of the western district to be regarded as a member of the court? Surely the circumstance that the law directs this court to be holden alone at a place in the eastern district is not material, since it does not make it alone the court

for that district, and hence, as it would seem, does not give to the judge of that district any more right to sit here than is given to the judge of the western district. The same construction which would exclude JUDGE KREKEL would exclude JUDGE TREAT, and the exclusion of both would be a result so plainly in conflict with the scheme of the organization of the circuit court, with the language of the Act of 1869 not less than that of 1857, that the view which leads to it or involves it cannot be sound.

This court owes its existence to the Act of 1857, which gave it its constitution. In passing it Congress was adapting special provisions to meet the wants of this State. The Act of 1869 had no reference to the special case of Missouri. It did not abolish the circuit court for Missouri, nor change the law by which that court was created and organized, except in the particulars wherein the two acts are repugnant. It conferred powers and jurisdiction upon the judges it created, but did not destroy or interfere with the rights, powers, or jurisdiction of the district judges to sit with the justice of the supreme court, or with the newly created circuit judge. This conclusion finds support in other considerations to which I may briefly advert.

The judiciary act, so styled by way of eminence, passed [6] during the same year in which the constitution itself went into operation, and which organized the national courts, provided both for the district and the circuit courts. The States were erected into districts, and the districts arranged into circuits. By that act the district judge sat in the circuit court, and except for a brief period under the Act of 1801, repealed in 1802, the district judges have ever been entitled to sit in the circuit court. Through the district judge the circuit court had a connection with the district court, and through the supreme justice with the supreme court. The plan though complex was nicely adjusted, and its different parts skillfully fitted together and made into a symmetrical and harmonious system. The scheme of juridical organization and jurisdiction provided by judiciary act has, from that time to this, been the object of the unqualified admiration of statesmen, lawyers, and judges, so much so, indeed, that Congress has hesitated to touch or amend it even when it seemed clearly defective or inadequate.

If the Act of 1869, which it is suggested has wrought so great a change as to deprive one or both of the district judges from sitting in, or holding, this court, is carefully examined, it will be seen how cautious Congress was, in attaining the end designed, to innovate as little as possible upon the long established and approved judicial system. The care and deliberation which it evinces, as well as the plain, direct, and perspicuous language in which its provisions are expressed, make it a fitting supplement to the famous act which it amends.

By the judiciary act the circuit court was peculiarly constituted. It was a distinct tribunal, with a separate, clearly defined, and most important jurisdiction, original and appellate, embracing causes criminal and civil, at law, in equity, and in admiralty.

Though it was a court thus distinct and thus important, it had no judge of its own. It was held by the justice of the supreme court and by the district judge, each of whose duties^[7] was mainly in another tribunal, and neither of whom was commissioned as a circuit judge. In 1789, and for years thereafter, the judicial force thus provided was adequate to the wants of the country; but long prior to 1869 it had ceased to be so. The business of the supreme court had increased and accumulated so as to demand quite all the available time of the judges of that court. It had become simply impossible for them to do all their circuit and all their appellate work. Additional judicial force was absolutely necessary, and Congress was called upon to supply it. To provide this was the object of the Act of April 10, 1869. To provide it without radical and unnecessary changes in a system of judicial organization which long experience had sanctioned and approved was the obvious dictate of wisdom and sound policy. Thus viewing the matter, Congress, in passing the Act of 1869, in substance said: We have courts enough, but not judges enough to do the work; there is no need to recast the courts; the district courts in general are not overworked, and when they are the remedy is easy; the circuit court has no separate judges of its own; we will create them, thus at once relieving the labors of the supreme justices, and furnishing additional force in the circuits, but we will otherwise maintain the existing constitution of the circuit

courts by still requiring, in the manner specified, both the supreme justices and the district judges to sit in and hold the same.

Such was the purpose of the legislation of 1869. The general language of the act should be viewed in the light of the objects sought to be effected, and construed accordingly. Thus viewed and thus construed, it cannot have the effect to annul special provisions in other acts passed to meet special wants, when thus to hold would be to declare that Congress, with respect to the circuit court for this State, had departed from a line of policy almost coeval with the existence of the government, and which has been sanctioned by the approving judgment of nearly three generations of lawyers, judges, and ^[8] statesmen. (3 Webster's Works, 150, *et seq.*) The argument might be extended and the reasons multiplied, but it is not necessary. I am of the opinion, in which the district judges concur, that the latter are both members of this court, with the powers, jurisdiction, and duties conferred and enjoined by the Act of 1857, except so far only as the same are necessarily modified by the act creating the circuit judges.

It may be added that by the statute of 1869 the district judge does not, in any case, sit in the circuit court when the supreme justices and circuit judges are both present. In this respect that act necessarily modifies the prior Act of 1857, and to this extent innovates upon the judicial system established by the judiciary act.

But this is a conjunction not likely often to occur, and the change in this respect is more nominal than real; and Congress was induced, doubtless, to give its sanction to it, perhaps partly to keep the circuit court from being too large to allow divisions of opinion to be certified, and perhaps to economize the judicial force, and not unnecessarily to take the district judges from their own courts.

The result is that both or either the district judges of this State may sit as heretofore with either the supreme justice or the circuit judge, and in their absence, both or either of the district judges may, as before, sit in or hold the circuit court.

TREAT, J., and KREKEL, J., concur.

[NOTE. — Confirmatory of the correctness of the foregoing view, see the Act of July 1, 1870, (16 Stats. at Large, 179), passed since the above opinion was delivered.]

CLARK v. DICK.

CONSTITUTIONAL LAW — MARTIAL LAW. — Section 4, article 11, of the constitution of the State of Missouri, which in substance exempts persons from liability for acts done during [9] the recent civil war, by virtue of military authority vested in them by the government of the United States, or in pursuance of an order received from any person vested with such authority, is valid, and protects from prosecution or action all who can show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States.

ID. — Where in an action of trespass, the defendant pleaded, in substance, that civil war existed, that martial law was in force, and that the alleged trespasses were compulsory assessments, made upon the plaintiff or his property by virtue of an order of the commanding general of the army in that department. *Held*, that the facts pleaded brought the case within the above-mentioned section of the constitution of the State, under which they were a good defense to the action. That provision of the constitution is not void because of its retrospective operation, nor because other provisions of the constitution may prohibit the legislature from passing retroactive statutes. Nor does it conflict with the national constitution limiting the power of the States; nor is it rendered invalid by the fifth amendment to the constitution, as that is a limitation on the powers of the general government, and not on those of the States.

ID. — LIMITATION OF ACTIONS — REMOVAL OF CAUSES INTO THE FEDERAL COURTS. — The facts above mentioned, pleaded as a defense to the action, bring the case within the two years' limitation clause of the Act of Congress of 1863 (12 U. S. Stats. 757), and this limitation is applicable to a case originating in a State court, and by virtue thereof properly removed into the federal court.

ID. — This statute, providing for the transfer of this class of cases into the federal courts is constitutional (*Cooper v. Nashville*, 6 Wall. 247); and Congress has the power to regulate the remedy, and to prescribe the period within which suits must be brought.

ID. — This statute, by its terms, applies to all cases described therein, and the limitation period extends to and includes cases of the character mentioned in the State courts as well as in the federal courts. (*Arguendo*, per MILLER, J.)

Before MILLER, J., TREAT, J., and KREKEL, J.

THIS was an action of trespass originally commenced in one of the State courts of Missouri, and afterwards removed, under the Act of Congress of 1863 (12 U. S. Stats. 757), to the circuit court of the United States, for the districts of Missouri. The right of removal was not contested or denied.

[10] The trespasses were alleged to have been committed in the city of St. Louis, in January, 1862. The defendant pleaded that at the time the alleged trespasses were committed, a state of civil war existed; that martial law was duly declared, and that the alleged trespasses were compulsory assessments or contributions, made by order of the general of the army of the

United States in command of the department of Missouri; and claimed the benefit of section 4, article 11, of the constitution of the State of Missouri, and of the two years' limitation clause of the above-mentioned Act of Congress of 1863, both of which are referred to in the opinion of the court.

The plaintiff demurred to the pleas.

Lackland, Martin & Lackland, for the Demurrer.

Sharp & Broadhead, contra.

MR. JUSTICE MILLER. — The first plea is a very minute and specific statement of facts intended to show that at the time of the supposed trespasses there existed in the State of Missouri, and in the city of St. Louis, where the transaction occurred, a state of flagrant war; that in consequence the commanding general had placed the city of St. Louis under martial law, and that by virtue of such military authority he had caused contributions to be levied on certain persons, of whom the plaintiff was one; that a commission had been appointed to assess these contributions by the commanding general, and afterwards a committee authorized to revise the original assessment; that of this latter committee the defendant was a member and took part in its revision; but that they took no specific action in plaintiff's case; that the defendant had no other or further connection with the alleged trespasses, though other officers seized the goods mentioned under orders of the commanding general, in pursuance of said assessment.

The proclamations and orders of the commanding general [11] are set out in full, and the fourth section of article eleven of the constitution of Missouri is pleaded as a defense.

The second plea is, that the said supposed trespasses and wrongs complained of and set forth by the plaintiff in his petition were done and committed under and by virtue of authority derived from the president of the United States, and more than two years before the commencement of this suit and during the rebellion.

The first plea may be liable to objection on the ground that it is a recital of facts after the manner of an answer in chancery, rather than a statement of the legal proposition which is sup-

posed to be proved by these facts, and it is called by the pleader an answer. But we understand counsel for plaintiff to waive this objection, and the court is requested to pass upon the question, whether the plea discloses a substantial defense to the cause of action set out in the petition.

The validity of the plea is based by counsel on two distinct grounds:—

First. That the facts set out bring the case within the protection of section 4, article 11, of the constitution of the State of Missouri.

Second. That the same facts show a condition of flagrant war which justified the substitution of martial law for the civil law, so far as to protect persons acting in obedience to military orders.

The provision of the constitution of Missouri relied on in this plea is as follows: "No person shall be prosecuted in any civil action or criminal proceeding, for or on account of any act by him done, performed, or executed, after the first day of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall heretofore have been, or shall be hereafter instituted against any person ^[12] for the doing of any such act, the defendant may plead this section in bar thereof."

There does not seem to be any reason to doubt that the averments of this plea bring defendant's case within the language and intent of this provision. They show very clearly that the defendant acted under the orders of the military officer highest in command in the department of Missouri. That this officer represented the president, who is commander-in-chief of the army, and was vested with all authority, as such military commander, that belonged to the president cannot be doubted.

The defendant thus acted in pursuance of orders from one vested with full military authority; and unless we are to go into the question whether such authority can possibly exist in this country, we must concede that the case is one intended to be provided for by this section. If the defendant is required to show that the authority of the military commander was a

rightful and legal authority in the particular matter in question, then the provision in the Missouri constitution is useless. For it must be conceded in all courts that an act justified by lawful and competent authority in the particular case cannot be the foundation of an action.

The clause we are considering was not intended for such a case. It was not needed. But the framers of that instrument were aware that many acts of violence had been done by the military, and by those subject to military orders, for which it might be difficult to find legal and technical justification, but which was thought to be necessary and proper to maintain the national supremacy. They therefore intended to provide for those cases. And while they did not pretend to give protection to lawless violence, committed by persons without orders from any competent authority or any recognized military officer, they did intend to shield from prosecution all who could show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States.

[18] The wisdom of this ordinance has lost none of its force by the lapse of time. As a provision for the repose and quiet of the community, it could nowhere be more useful than in Missouri.

This section of the constitution was not in force when the acts complained of occurred. It has become a part of the constitution since, but, as its language clearly shows, was intended to have effect on such past transactions. It is said that for this reason it is void.

It has been repeatedly decided that retrospective laws are not void, for that reason, unless they are made so by express constitutional provision. There may be such a provision in the Missouri constitution as to retrospective statutes. But it is not a statute whose validity we are considering. It is one of the articles of the constitution itself, a part of the very fundamental law whose authority is invoked. Of course this must stand as well as any other part of the constitution, and cannot be nullified by the more general provisions of the same instrument concerning the powers of the legislature.

There does not seem to us to be anything in the nature of this law itself, or in its relation to the power of the people when

in convention assembled to enact organic laws, which forbids them to pass this ordinance.

It is to be observed that plaintiff's right to recover by action in the courts for such trespasses as he describes, rests on the common law as adopted by the State of Missouri, that is, on the law of the State, and not on any law of the federal government. There is no common law of the federal government. The right to bring this suit is founded on the law of the State, however that right once existing may be restricted by the federal constitution, of which we shall inquire presently. We repeat, then, that we know of no limitation, except it can be found in the constitution of the United States, of the right of the State of Missouri, when represented in her sovereignty in convention, to take away the ⁽¹⁴⁾ right of action which it had previously given, if the best interests of the body politic so convened require it.

This very proposition came before the supreme court of Missouri, in the case of *Drehman v. Stifle*, 41 Mo. 184, and the validity of this section, as applicable to suits for damages for trespass, was affirmed on grounds similar to those stated above.

That case, however, was contested on the further ground, that this section of the Missouri constitution was in violation of the federal constitution, and therefore void. It was accordingly taken by a writ of error to the supreme court of the United States, and in that court it was urged that it was forbidden by several provisions of the federal constitution, limiting the power of the State legislatures. But that court held that it was not a bill of attainder, nor an *ex post facto* law, nor a law impairing the obligation of contracts—in fact, that so far as the federal power in the matter was concerned, the court saw nothing to render the section invalid. (*Drehman v. Stifle*, 8 Wall. 595.)

It is strenuously urged here, however, that plaintiff's right of action in this case was property, and that the Missouri constitution deprives him of that property without due process of law, within the meaning of the fifth amendment to the federal constitution.

If we could see our way clear to hold that a right to sue for a personal trespass was property within the meaning of that amendment, the argument is in no way advanced. For it has

been often held by the supreme court of the United States that the fifth and sixth amendments to the federal constitution are limitations upon the powers of the federal government, and not upon those of the States. In *Twitchell v. Commonwealth*, 7 Wall. 321, this is said to be no longer an open question. This amendment to the federal constitution cannot therefore render invalid the provision of the constitution of Missouri.

We are of opinion, for these reasons, that under the facts [15] set out in the first plea this provision is a valid defense to the action. This renders unnecessary any further examination of the reasons urged in support of that plea.

The limitation clause of the Act of Congress of 1803 (12 U. S. Stats. 757) also covers this case, both in its language and spirit.

The only objections made to this plea are that it is inapplicable to a case originating in a State court, and if so construed it is void because beyond the power of Congress.

That Congress has a right to provide for the trial of this class of cases in the federal courts is established by the case of *Cooper v. Mayor of Nashville*, 6 Wall. 247, in which that part of the statute is considered fully, and its constitutionality affirmed. The right of removal does not seem to have been contested or denied in the present case.

The right of removal under this statute does not depend on the citizenship of the parties, but on the nature of the controversy. The defense set up is one which rests upon the exercise of certain powers in the name of the federal government, and the federal judiciary is the proper one to try such questions, because the constitution of the United States declares that the judicial power of the United States extends to all such questions.

If Congress has the right to determine in what courts such questions must be tried, it must necessarily have the power to regulate the remedy, including the right to prescribe the time within which the suit may be brought. That Congress has the right to protect the officers upon whom it imposes delicate and important duties from vexatious suits, arising out of transactions in which their official duties may involve them, by prescribing a reasonable time within which such suits may be brought, seems to be properly incidental to the right to command such services.

Nor is the objection sound that in such cases the action, if tried in the State court, would be subject to the law of limitations prescribed by the State, while in the federal court a [16] different rule would prevail. For the act of Congress by its terms applies to all cases of the character described in the statute, and we see no reason to limit its application to the federal courts. If Congress has a right to legislate on this subject, it has a right to make the legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration.

It will thus be seen that all the questions involved in these demurrers have been settled by the supreme court, and the demurrer is overruled.

TREAT, J., and KREKEL, J., concurred.

Judgment accordingly.

COVINGTON v. BURNES, ADMINISTRATOR.

ASSUMPT—PLEA OF PLENE ADMINISTRAVIT.—Where the statute classifies the debts against an estate, directs the order of payment, and only makes an administrator liable to the extent of assets received, the common-law plea of *plene administravit* is no defense, and is not proper in an action against the executor merely seeking to establish the existence of the plaintiff's debt against the estate.

Before DILLON, J., TREAT, J., and KREKEL, J.

ACTION by the indorsee against the administrator of the indorser of two promissory notes. The plaintiff demurs to the second and third pleas, each being a plea of *plene administravit*.

Noble & Hunter, and *Glover & Shepley*, for the Plaintiff.

Thos. T. Gantt, for the Defendant.

DILLON, Circuit Judge—This is an ordinary action against an administrator upon the contract of indorsement made by his intestate. The plaintiff seeks simply judicially to establish [17] his claim against the estate. The statute of Missouri in terms

declares that "any person having a demand against an estate may establish the same by the judgment or decree of some court of record." (Genl. Stats. 1865, 502, § 8.) The right of the plaintiff to bring this action is clear and undisputed. (*Payne v. Hook*, 7 Wall. 425.) Each of the pleas demurred to is, in form and substance, a common-law plea of *plene administravit*, viz., that the defendant has now no assets of the decedent, but had, before the commencement of this action, fully administered the same. The demurrer raises the question whether under the laws of the State of Missouri the plea of *plene administravit* is a defense, or presents an issue which it is proper to try in an action of this character, to wit, an action merely to establish the validity and amount of the debt against the estate.

The modes of the administration of the estates of deceased persons in England and in most of the American States are in many respects very different. In England, if an administrator suffered a judgment to go against him by default, or failed to plead that he had fully administered, such a judgment was held to be a conclusive admission by the administrator that he had assets sufficient to pay it, and in effect bound the administrator personally, and amounted to an appropriation of such assets to the payment of the judgment. Hence the reason and also the necessity for such a plea.

Not so, however, here. Whether the administrator does or does not defend, he is bound personally, and there is no judgment *de bonis propriis*, and no execution against either the goods of the administrator or of the decedent. The judgment simply establishes the debt and orders it to be paid by the administrator in due course of administration. (*Armstrong v. Cooper*, 11 Ill. 560; *Laughlin v. McDonald*, 1 Mo. 684.) Under the laws of Missouri, the administrator is liable only to the extent of assets received, and for waste and mismanagement. The statute classifies the debts against an estate, and directs the mode and order of payment by the ^[18] administrator. A judgment such as the plaintiff seeks is no evidence that the administrator has assets, or that he has been guilty of any default; and any inquiry of that kind in an action such as the present is entirely collateral, and it does seem to us most manifestly improper.

For the reasons above given, the courts in other States have

held, under statutes like that of Missouri, that a plea of *plene administravit* is not a good plea. (*Allen and Wife v. Bishop's Executors*, 25 Wend. 414; *Baker's Executors v. Gainor's Executors*, 17 Wend. 559; *Butler v. Hempstead's Administrators*, 18 Wend. 666; *Judy v. Kelley*, 11 Ill. 211.)

In deciding, in the case last cited, that a plea of *plene administravit* is no answer to an action brought against an administrator, upon a debt due by his intestate, TREAT, C. J., remarks that such a plea "presents no defense. At common law the failure of an administrator to plead want of assets, or that he had fully administered, operated as an admission on his part that he had assets sufficient to satisfy the demand; and he was afterwards estopped from asserting that he had no assets, or that he had fully administered. Hence the necessity of this class of pleas. The case is different under our statute. . . . A judgment against an administrator only establishes the debt against the estate, to be paid in due course of administration. The creditor is not entitled to execution on his judgment, either against the administrator or the property of the intestate. (*Welch v. Wallace*, 3 Gilm. 490.) This change in the common law dispenses with the plea of *plene administravit* and renders it wholly unnecessary. It is in fact no defense to an action against an administrator."

The same reasons obtain in this State. Whether the administrator has or has not assets, has or has not been guilty of waste or mismanagement, are questions which may be hereafter tried, if the plaintiff establishes his debt; but it is premature to try them now, and improper to introduce such extraneous issues into this suit.

TREAT, J., and KREKEL, J., concur.

Demurrer sustained.

[19]BABBITT, ASSIGNEE, v. WALBRUN & CO., PLAINTIFFS
IN ERROR.

BANKRUPTCY—SALES OUT OF ORDINARY COURSE.—Under the thirty-fifth section of the bankrupt act it was held erroneous to instruct the jury “that if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent.” The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was *prima facie* evidence that it was fraudulent.

Id.—PROOF OF FRAUD.—A sale of property by the bankrupt out of the usual and ordinary course of business is presumptively fraudulent, but this presumption may be rebutted by evidence *aliunde*, to be produced by the vendee.

Id.—When it is sought to affect a second vendee with fraud, such fraud must be shown, and the *mere fact*, without more, that he knew that the sale by the bankrupt to the first vendee embraced all of the stock of the seller, will not make the purchase of the second vendee fraudulent in law.

Id.—Certain sections of the bankrupt act, relating to fraud, commented on by the circuit judge

Before DILLON, J., and TREAT, J.

THIS case is brought here by writ of error from the district court of the western district of Missouri. The plaintiff is the assignee in bankruptcy of one Mendelson, and brought this action in trover against the defendants, Walbrun & Co., to recover the value of a stock of goods which the bankrupt sold to one Summerfield, and the latter to the defendants.

Mendelson is shown by uncontradicted evidence to have been insolvent, and he sold the whole stock of goods to Summerfield (his brother-in-law) at one time, he having written to the latter to come to the place where the former was living, with a view to disposing of his goods to him. Mendelson had but little if any other property. Summerfield remained there a few days, and leaving the goods in possession of Mendelson, went to the defendants, living in another place and with whom he was acquainted, informed them of his purchase of Mendelson, the price he gave, and offered to sell the goods to the defendants at five per cent profit. One of [20] the defendants went with Summerfield to the place where the goods were, stopped at Mendelson’s house, examined the goods, accepted Summerfield’s offer, and paid him in cash (as defendants and Summerfield both testify), the purchase money for the goods, and removed them to the defendants’ place of business.

There was evidence tending to show that the defendants, or

one of the firm, knew that Summerfield had purchased the entire stock of Mendelson; but there was no direct evidence that the defendants or either of them, knew that Mendelson was in debt, or that he had any fraudulent purpose in disposing of the goods to Summerfield.

There was no evidence that either of the defendants made any inquiry on these subjects.

Both Mendelson and Summerfield testify that the latter paid the former in cash for the goods, but Mendelson never paid any of the money to his creditors, giving, as a reason, that he had lost it.

This is a mere outline of the case, but sufficient to enable the instructions, which were given to the jury, and which are assigned as error, to be understood.

Among other instructions to the jury, the court gave the following:—

1. "If, upon considering the facts and circumstances of the case, you come to the conclusion that the sale was not in Mendelson's ordinary and usual course of business, then the sale was fraudulent. If the sale is found by you to have been fraudulent, the next inquiry will be, were the defendants, Walbrun & Co., so connected with the sale throughout, as to make them parties in it, or affect them with notice; that is, such knowledge or relation to it as to make them liable.

"The firm of Walbrun & Co. consists of three partners; what any one or more of the partners did, or knew, is the knowledge of the whole of the partners, and they are, so far as this case is concerned, alike responsible.

2. "Returning to the first view presented in regard to Mendelson's ^[21] insolvency, and the reasonable cause to believe it which Summerfield must have had, in order to make the sale void, you are instructed that if either of the partners of Walbrun & Co. had reasonable cause to believe that, at the time of the sale to Summerfield, Mendelson was insolvent, or acting in contemplation of insolvency, and the sale therefore void, and they or either of them afterwards, with that knowledge, purchased or obtained possession of the stock of goods in controversy, and converted them to their own use, they are responsible for the value of the goods.

3. "Upon the second branch of your inquiry as to the *prima facie* fraudulent sale, because not made in the usual course of business, you are instructed that if Walbrun & Co., or either of the partners, knew that the sale was not made in the ordinary and usual course of business, by Mendelson to Summerfield, they are all affected with knowledge of the legal fraud, and if they afterwards in any manner obtained possession of the goods, and converted them to their own use, they are responsible for their value. The fact that the goods passed through the hands of Summerfield makes no difference in the liability of Walbrun & Co., provided they were affected with knowledge or notice of the fraud, under the instructions given."

The plaintiff recovered, and the defendants prosecute a writ of error.

Allen, and Broadhead, for the Plaintiffs in error.

N. Meyers, for the Defendant in error.

DILLON, *Circuit Judge*.—The question is whether the instructions to the jury referred to in the statement of the case are correct; and this involves a construction of the thirty-fifth section of the bankrupt act.

The second branch of this section is in these words: "And if any person being insolvent, or in contemplation of insolvency [229] or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay, the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of

BEAN, ASSIGNEE, ETC., v. BROOKMIRE & RANKIN.

BANKRUPT ACT—CONSTRUCTION OF THIRTY-FIFTH SECTION.—The two clauses of the thirty-fifth section of the bankrupt act apply to transfers to two different classes of persons dealing with the bankrupt. The first clause applies to a creditor or a person having a claim against the bankrupt, or who is under a liability for him and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him.

ID.—LIMITATION.—The four and six months' limitations in the thirty-fifth section of the bankrupt act considered; and it is held that where the transaction by the [23] insolvent is with a creditor, the four months' limitation applies, but where the transaction is with a general purchaser, the six months' limitation governs.

ID.—Accordingly, where in an action by the assignee under the thirty-fifth section of the act, the declaration alleged a payment by the bankrupt to the defendants in liquidation of an existing debt, and to have been made to them as creditors of the bankrupt, with intent to give a preference; and alleging that this was done within six months, but not within four months of the filing of the petition under which the bankruptcy was established, it was held to be demurrable.

ID.—All illegal or fraudulent transactions which are so by the common law, by the statute law, or by rules of law, other than the special limitations in the thirty-fifth section of the bankrupt act, are governed by the limitation of two years upon the assignee in bringing the suit. (*Arguendo*, per MILLER, J.)

BANKRUPT ACT—PURPOSE AND POLICY.—Purpose and policy of the bankrupt act as stated by MILLER, J.

Before MILLER, J., and KREKEL, J.

THIS was an action by the assignee in bankruptcy of Charles S. Kintzing, brought under the thirty-fifth section of the bankrupt act, to recover of the defendants the value of certain property alleged to have been conveyed by the bankrupt to them, in fraud of the bankrupt law.

The district court (TREAT, J.) sustained demurrers to the declaration, and the cause came into the circuit court on a writ of error. The facts sufficiently appear in the opinion of the court.

MR. JUSTICE MILLER.—This case comes before us on a writ of error to the district court for the eastern district.

The plaintiff in error brings his suit to recover as assignee of the bankrupt the sum of fourteen hundred and thirty-six dollars, paid to the defendants within six months, but not within four months of the filing of the petition under which the bankruptcy was established. The declaration contains two counts

intended to cover the ^[206] two clauses of the thirty-fifth section of the bankrupt law, in one of which the transaction is described as a payment in liquidation of an existing debt, and in the other it is alleged to have been made to defendants as creditors of the bankrupt with intent to give a preference. In both counts, the insolvency of the bankrupt at time of the transaction is alleged, and also the knowledge or notice of that fact on the part of defendants, and that it was within six months of the filing of the petition in bankruptcy.

Demurrers were filed to both counts by defendants which were sustained by the district court, and this ruling is the error assigned here. The determination of the question here presented necessarily involves a construction of the section of the bankrupt act just referred to, or rather the first two clauses of it, which are in the following words: "*And be it further enacted*, that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property, to any person who then has ^[207] reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in

bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

And I commence the examination into the true meaning of the section in its application to the question before me, by affirming what I am told was held in this same court at the last term, namely: that the two clauses differ mainly in their application to two different classes of recipients of the bankrupt's property or means. That is to say, that the first clause is limited to a creditor or person having a claim against the bankrupt, or who is under any liability for him, and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him. That the first clause is confined to persons of that character, cannot well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That the second clause has reference to another class of persons, and is governed by other rules, seems to be strongly sustained by these considerations:—

1. The sale or other transfer of property mentioned in it need not be in *preference* of a creditor or person liable for the bankrupt to make it void.

[28] 2. It need not be made to a person of that character.

3. In the first clause the transfer may still be valid though within all the other conditions of the clause, if made more than *four* months before the filing of a petition in bankruptcy, while the transfer described in the second clause requires that it shall have been made more than *six* months before the filing of the petition to have the same effect.

These are sufficient reasons to justify our conviction that the

two clauses apply to transfers to two different classes of persons dealing with the bankrupt.

It is objected to this view that in the second clause *payment* is one of the acts described, as well as in the first, and that the word necessarily implies a transaction between debtor and creditor.

The force of this objection is fully met by the language of that part of the section which makes void the acts against which it is directed, and which, while declaring that such "sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof," omits to make any such provision as to *payment*, while in the invalidating language of the first clause, that is the first word used.

The word "payment" may have been used in the second clause inadvertently, or in a loose sense to include some consideration advanced by the insolvent in some one of the transactions otherwise forbidden; but, however it came to be used it is quite certain that it is intentionally omitted where the transactions are mentioned which are declared to be void.

The *payment* described in both counts of this declaration is not one covered by the second clause of the section. It is a payment of money to a creditor on account of an existing debt, and is a preference within the meaning of the law. It is clearly one of the transactions described in and forbidden by the first clause, and therefore not included within the second. [29] We need, therefore, inquire no further concerning its relation to the latter.

In regard to the first clause, both counts would be good under that, if they contained the averment, that the transaction described took place within four months before the filing of the petition in bankruptcy. But this allegation cannot truthfully be made, and the principal question in this case is whether that is necessary to make the count good.

The language of the section is, that if any person being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give the creditor a preference by any of the acts therein mentioned, the act shall be void, and the assignee may recover the property from the person receiving it, if such person had reasonable cause

to believe the party insolvent. It is very certain that the act described is not made void by this clause, or by any clause in this section, unless it was done within four months of the filing of a petition by or against the bankrupt, and it is as strong an instance as can well grow out of a negative pregnant, that no such act is void, for any of the causes there mentioned, that was done within the four months.

In opposition to this view of the subject, it is earnestly contended that one of the clauses of the *thirty-ninth* section of the act describes pretty nearly in the same language the acts mentioned in the thirty-fifth section, and concludes that section with the declaration that if the person doing such acts shall be declared bankrupt, the assignee may recover the property transferred contrary to the provisions of the statute, making no restrictions as to time; and that the two sections can only be reconciled in this regard, by holding that the special provisions of section 35 are to be taken as a rule of evidence, not imperative, but *prima facie*, that the transaction was fraudulent, if within the period therein mentioned.

Having thus stated the opposite opinions of this thirty-fifth section, maintained by counsel, I do not know that I can ⁽³⁰⁾ do better than to state my own views of the policy which governed Congress in its adoption.

The acts mentioned in the section are not such as were forbidden by the common law, or generally by the statutes of the States. Nor are they acts which, in their essential nature, are immoral or dishonest. For a man who is insolvent, or approaching insolvency, to pay a just debt, is not morally wrong, nor was it forbidden by any law in this country previous to the bankrupt act. And though a preference of creditors by transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by the common law, and is not forbidden by many of the States.

It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said.

But they were about to frame a system of laws, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted wisely, as the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not without hardship be made of universal application. When a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt, knowing that he must soon be helpless, would desire to pay or secure favorite creditors. They knowing his inability to pay, and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

[21] In this dilemma Congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong; and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences.

In all cases where an insolvent pays or secures a creditor to the exclusion of others, and the creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, if otherwise honest, shall stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution.

Congress in this view seems also to have thought that in case of a creditor who had already parted with his money or property to the insolvent party, and whose reasons for such further dealing with him were more pressing, that he might be saved from an impending loss, the time which should secure the transaction from the effect of the bankrupt law should be less by

two months than in the case of one who, having no such incentive to action, became a volunteer purchaser of an insolvent's property, with knowledge of his insolvency.

It is in a similar spirit that the provision in section 23, which forbids a person accepting such a preference from sharing in the assets of the bankrupt, uses the qualifying phrase, "until he shall first have surrendered to the assignee all that he had received under such preference."

I do not see any necessary contradiction between section 39 and this view of section 35. The former is a very long one, and recites all the acts which subject a person to involuntary bankruptcy, and that is the main purpose of the section. Among the acts which constitute a ^[33] man a bankrupt are those of giving preference to creditors in contemplation of bankruptcy. And it is in conclusion of that section declared in general terms, that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property which was the subject of the act of bankruptcy. But this general declaration of the right of the assignee to recover is not inconsistent with the limitation of the right in another section to cases occurring within six and four months of the commencement of the bankrupt proceedings. The general declaration of a State statute, that a person shall recover land by an action of ejectment, is not inconsistent with the provision in the Statute of Limitations that such actions must be brought within ten years after they have accrued. Nor is it inconsistent with the still more comprehensive right of suit conferred on the assignee by the fourteenth section of the act.

The thirty-fifth section and the thirty-ninth section, having for the first time set up a rule by which certain payments and transfers of property shall be declared void (a rule at variance with the common law, and with the statutes of the States), very properly limits and defines the circumstances within which this new rule shall operate. These are, among others, that the recipient of the bankrupt's money or property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent when the bankrupt law was applied to the case—with a creditor within four months, and with the general purchaser within six months.

As to all illegal or fraudulent transactions which are so by common law, by statute law, or by any other recognized rule of law, other than these special provisions of the bankrupt law, that act has imposed the limitation of two years on the assignee in bringing his suit, and by that they are governed. But the case made by the plaintiff does not come within any such law known to us. Therefore, his declaration [28] is bad, and the demurrer was properly sustained by the district court, whose judgment is affirmed.

Affirmed.

KREKEL, J., concurred.

Edmund T. Allen, for Plaintiff in error.

George M. Stewart, for Defendants in error.

Note. Bankrupt Act—Construction of 35th Section, as to limitations and preferences.—Affirmed, *Gibson v. Warden*, 14 Wall. 249. Followed, *Maurer v. Franz*, 4 Bank. Reg. 143; *In re Dow*, 6 Bank. Reg. 15; *Collins v. Gray*, 8 Blatchf. 486; *Anibal v. Heacock*, 2 Fed. Rep. 171, 173; *Coggeshall v. Potter*, 1 Holmes, 79; *Matthews v. Westphal et al.* 1 McCrary, 449; *Bean v. Brookmire*, post, 154. Cited, *In re Scott & McCarty*, 4 Bank. Reg. 141; *Darby's Trustee v. Boatman's Sav. Inst.* post, 145; S. C. 4 Bank. Reg. 196; *Bean v. Brookmire*, 2 Dill. 115; S. C. 6 Bank. Reg. 575; *Harvey v. Crane*, 2 Biss. 500; S. C. 5 Bank. Reg. 221; *Jordan v. Dorney*, 40 Md. 413. Doubtful, *Ex parte Mendell*, *Re Butler*, 1 Low. 508; S. C. 4 Bank. Reg. 92.

IN THE MATTER OF WM. DOWNING, BANKRUPT.

BANKRUPTCY—RIGHTS OF INDIVIDUAL AND FIRM CREDITORS.—Where a partnership has been dissolved and one of the co-partners purchases all of the assets of the firm, and agrees to pay all of the debts, and both partners subsequently become bankrupt, and are individually put into bankruptcy, so that there is no solvent partner and no firm property. *Held*, under the Bankrupt Act of 1867, that the creditors of the firm, as well as the individual creditors of the partner who assumed to pay the firm debts, were entitled to share *pari passu* in the estate of such partner.

Id.—BANKRUPT ACT—CONSTRUCTION OF THIRTY-SIXTH SECTION.—Under the bankrupt act (§ 36) assets are to be marshalled between the firm creditors and the separate creditors of the partners only when there are firm and separate assets, and proceedings are instituted against the firm and the individual members, as provided in that section.

Before DILLON, J., and KREKEL, J.

THE facts in the case, which were agreed to by the respective counsel, show that the bankrupt, William Downing, and one Richard W. Emerson, were co-partners under the firm name of Downing & Emerson, and as such were dealers in boots and shoes in the city of St. Louis previous to December, 1868; that in the month of December, 1868, they dissolved by consent, Downing purchasing the stock of goods *and all other assets* of the firm, and agreeing to *pay off and discharge all* of its liabilities, and executing and delivering ^[24] to Emerson, for his (Emerson's) supposed interest in the concern, his notes, amounting to about forty thousand dollars; that said firm was then largely indebted and actually insolvent; that after the dissolution of said firm, Downing continued in his individual name, and for his individual account, to prosecute the business at the same place until the 16th day of August, 1869; that while so doing business alone, Downing, in the regular course of business, disposed of part of said stock of goods; added to it by further purchases, paid off some of the liabilities of the old firm, and contracted further liabilities and debts in his own name alone; that on the 16th day of August, 1869, Downing executed a conveyance or assignment of all his assets, including the assets which came from the firm of Downing & Emerson, to John W. Kennan, as trustee, for the equal benefit of all his individual creditors, and the creditors of said firm; that the trustee (Kennan) thereafter disposed of the stock of goods, realizing about sixty thousand dollars for it, and when he had done so, Downing was proceeded against and adjudicated a bankrupt by the said district court; that thereafter said Kennan paid over to the said assignee in bankruptcy, John A. Allen, the whole of the proceeds of the sale of said stock of goods; that the co-partnership of Downing & Emerson was never adjudicated bankrupt as such, nor have the persons holding claims against it released Emerson from liability on such claims, but that Emerson has also been adjudicated a bankrupt in the State of Massachusetts; that claims against the bankrupt Downing, individually, as well as claims against him as one of the said co-partnership of Downing & Emerson, have been proven and allowed against his estate without any distinction, except so far as the evidences of debt upon which the proofs were made

would show any, and that all these creditors voted for the said assignee; that before he was adjudicated a bankrupt, and after the 16th of August, 1869, Downing executed and delivered to each one of the creditors of Downing & Emerson an agreement in the following form:—

125. “Whereas, the firm of Downing & Emerson, which was composed of William Downing and Richard W. Emerson, was, in the month of December, A. D. eighteen hundred and sixty-eight, dissolved; and whereas said Emerson assigned to said Downing all his said Emerson’s interest in the property and assets of said firm, and said Downing, in consideration thereof, gave said Emerson certain promissory notes, and agreed to assume and pay all the liabilities and debts of said firm of Downing & Emerson, and hold said Emerson harmless from the same, and I have agreed to pay the debts and liabilities of said firm, as my own private individual debts, and the party with whom this agreement is made may now have debts and claims against said firm: now, therefore, I, the said Downing, for value received by me of —, the receipt whereof is hereby acknowledged, do hereby covenant and agree with said —, that I, individually, will pay, as my own private and individual debts, all and singular, the debts, liabilities, and claims against said firm of Downing & Emerson, held by said —. Witness my hand and seal, this — day of September, 1869.”

At a meeting of the creditors of said William Downing, called by and held before Register Eaton, for the purpose of distributing the said sixty thousand dollars, some of the individual creditors of Downing, who became such creditors after the dissolution of the firm of Downing & Emerson, filed a motion insisting that they and other individual creditors of Downing were alone entitled to share in the distribution of said fund, while on the other hand, those of the creditors who held debts against Downing & Emerson made the same claim. Then the question arose as to how the distribution should be made, and that is the question certified. The district judge gave the following opinion or decision: “Upon the facts submitted, the court rules that the separate creditors of the bankrupt must be first paid in full before the partnership creditors can receive any dividends from the funds in the hands of the assignee.”

[36] To this decision and ruling the assignee excepted and prosecuted this appeal. It was also admitted in the argument in the district court, that Downing was adjudicated a bankrupt upon the petition of an individual creditor.

Hitchcock & Lubke, for Appellant.

Sharp & Broadhead, for Appellee.

DILLON, *Circuit Judge*. — The court finds this to be a very difficult case. The difficulty arises rather from the state of the authorities, all of which have been brought to our attention by the industry of counsel, than from any doubt in the mind of the court as to how it ought, on principle, to be decided. As an early determination is desired, we shall refrain from an extended examination of the cases cited, or elaborate exposition of our views, and content ourselves with indicating briefly the grounds of our judgment.

On either of two grounds the order appealed from is, in our opinion, erroneous.

1. This is a contest between the individual creditors of Downing, and those who became the creditors of the firm of Downing & Emerson, before its dissolution. It is admitted that Downing purchased of Emerson all "the goods and assets of the firm." There is no joint property. Emerson is a non-resident of this State, and is also insolvent and in bankruptcy. The ground on which the individual creditors claim priority is that, by the sale from Emerson to Downing, the property became the individual property of the latter, and that upon the well known equity rule, recognized, as it is claimed by the bankrupt act (§ 36), they, as the individual creditors of the bankrupt, are entitled to be paid out of his separate estate in preference to the firm creditors.

This rule, upon the agreed statement, has no application to the case. Downing, when he purchased the assets from Emerson, agreed with the latter "to pay off and discharge all [37] the liabilities" of the firm. This contract was binding on Downing, and so far as he is concerned, made these debts his own. As between Downing and Emerson, the former thereby became the sole and individual debtor. As between Downing and the

creditors, the latter had the legal right, if they deemed it to be for their interest, to treat Downing as individually liable to them on his promise to Emerson, for their benefit. In equity, the promise which Downing made to Emerson to pay these debts could be enforced against him; and this controversy is to be decided upon equitable principles. Indeed, a promise by one to another for the benefit of a third person may, according to the prevailing American doctrine, be enforced at law in the name of the latter, especially where, as in the case at bar, the promissor receives a fund or property with which to make such payment.

"In this country," says Mr. Parsons, "the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted, and we think it would be safe to consider this the prevailing rule with us; indeed, it has been held that such a promise is to be deemed made with a third party, if adopted by him, though he was not cognizant of it when made." (1 Parsons' Cont. 467, 468, 5th ed., and cases cited.)

"After some conflict of opinion it seems now to be settled in cases of simple contract that if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him." (2 Greenl. Ev. § 109, and cases there cited.) That Downing received, in the surrender to him of the assets, a sufficient consideration for his promise, cannot be disputed.

By this promise he is bound, and the creditors of the firm are in equity entitled to enforce it against him. It is on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to be able to get the benefit of this promise, made by one of its ^[28] members for their benefit. If Downing had secured this promise by mortgage, can it be doubted that equity (aside from the bankruptcy) would give the creditors the benefit of this security if they desired it? The right of the creditors given by the arrangement between Downing and Emerson is not defeated by the subsequent bankruptcy of Downing. They may assent to and claim the benefit of it at any time, either before or after bankruptcy of their debtor.

I look upon their rights in equity as being the same as if Downing had individually indorsed the pre-existing firm paper, in which case they could have proved their debt against either, if not indeed against both the firm and Downing.

It would be strange if the partners could, by the same transaction, make the assets individual property, but could not, with the assent of the creditors, make one of the firm debtors, also, individually liable. It carries out the contract precisely to hold that the parties made the property the individual property of Downing, and that the latter superadded to the existing liability to the creditors his individual liability.

2. But if the foregoing views should be erroneous, I am of the opinion that the same result is reached by the true construction of the Bankrupt Act of 1867.

In the case at bar it will be remembered the partnership had ceased to exist. There were no firm assets. Both of the members of the firm were separately in bankruptcy, and insolvent. Under these circumstances the creditors of the former firm of Downing & Emerson had, under section 19 of the bankrupt act, a right to prove their debts against the estate of Downing—especially as he had, for a valuable consideration, assumed to pay them. If no proceedings are taken against the partnership, under section 36 of the bankrupt act (which contemplates cases where there are both firm and individual assets and debts) firm debts may, as stated, be proved under section 19, are entitled to share *pro rata* under section 27, as it extends to “all creditors whose debts are [39] duly proved,” and are embraced in the discharge provided for in sections 32, 33, and 34. These sections provide for a discharge from “all debts and claims,” and the use of the word “partner” in section 33 shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for, or in respect of, partnership debts.

In other words, section 36 of the bankrupt act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshalled according to the equity rule, firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate estate of their debtor.

This construction of the bankrupt act has the merit of producing that equality, which it is the leading and manifest purpose of the act to secure, and in effect reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz.: That where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share *pari passu* in the estate of the bankrupt partner.

Upon the facts submitted this court is of the opinion that all of the creditors of the said bankrupt who had proved their claims before the register were and are entitled to share *pro rata* in the distribution of the estate of the bankrupt, whether their debts were originally against the firm of Downing & Emerson, or against Downing, individually. This court is therefore of the opinion that the court below erred in holding that the individual creditors of Downing were entitled to priority, and its judgment is reversed, and the assignee ordered to make an equal distribution of the estate among all the creditors whose claims have been duly established and registered.

KREKEL, J., concurs.

Reversed.

Note. Bankrupt Act — Rights of Individual and Firm Creditors under the 36th section. — Followed, *In re Isaacs & Cohn*, 6 Bank. Reg. 98; *In re Rice*, 9 Bank. Reg. 874, 876; *In re Long & Co.* 9 Bank. Reg. 248; *In re Tesson*, 9 Bank. Reg. 380; *In re Long & Corey*, 7 Ben. 147; *In re Knight*, 2 Biss. 525; S. C. 8 Bank. Reg. 443; *In re McEwen*, 6 Biss. 300; *In re Hamilton*, 1 Fed. Rep. 812; *In re Litchfield*, 5 Fed. Rep. 48, 50. Cited, *Amsinck v. Brown*, 22 Wall. 401; S. C. 11 Bank. Reg. 503; *Emery v. Canal National Bank*, 2 Cliff. 515; S. C. 7 Bank. Reg. 226; *In re Webb*, 4 Sawy. 329.

[40] ALLEN, ASSIGNEE, v. MASSEY.

BANKRUPTCY — FRAUDULENT CONVEYANCES. — When a sale or conveyance by the bankrupt before bankruptcy is void as to creditors, under the local statute of the State where he resides, and the sale or conveyance is made, the assignee of the bankrupt who represents in this respects the rights of the creditors, may impeach the same and bring suit for or in respect to the property sold or conveyed.

FRAUDULENT CONVEYANCES — MISSOURI STATUTE CONSTRUED. — The statute of the State of Missouri as to fraudulent conveyances, construed and applied.

Before DILLON, J., and KREKEL, J.

THIS is an appeal from the district court of the United States for the eastern district of Missouri. The plaintiff, as the assignee in bankruptcy of William Downing, filed his petition in February, 1870, in the said district court, against the defendants, representing that in October, 1868, the said bankrupt executed a bill of sale to Eliza A. Massey of certain household furniture in the possession of the bankrupt; that the property was never actually delivered to her, but the same has ever since been in the residence and possession of the bankrupt; that by reason thereof the bill of sale is void by force of the statute of Missouri relating to fraudulent conveyances, and the prayer is that an order may be entered declaring the sale to be fraudulent and void, and the property delivered by the defendants to the assignee.

The answer admits the execution of the bill of sale as alleged; denies that the property was never delivered to the said Eliza A., and alleges that the same was purchased by her in good faith of the said Downing, and that the same has ever since been and now is in her actual possession.

The evidence adduced in the court below consisted of the bill of sale and the deposition of Downing.

The bill of sale, acknowledged but never recorded, is dated October 31, 1868, and by it Downing, for the recited consideration of three thousand six hundred and forty-five dollars, sells and conveys to Eliza A. Massey "the ^[41] following furniture and other personal property now owned by me and *being in my residence*, situated on the north side of Washington Avenue, being No. 1,347, in the city of St. Louis"—here follows a detailed description of the furniture in library, parlor, and bed rooms, consisting of chairs, sofas, books, carpets, pictures, mirrors, etc.

The deposition of Downing, the bankrupt, disclosed the following facts:—

That he had lived in house No. 1,347, on Washington Avenue, above mentioned, for five years or more, and still lived there; that the house belonged to him; that Mrs. Massey was his sister-in-law, and that she and her husband, John Massey, had lived with him and his family for over fifteen years, the two making from time to time an amicable adjustment of

expenses. Downing's name was on the door-plate of the house, and the house and establishment were known as his. The furniture and property in question were his prior to the alleged sale to Mrs. Massey. Downing was engaged largely in business, but in October, 1868, his partner allowed a note of the firm to go to protest, and fearing the consequences and desiring to secure to his sister-in-law three thousand six hundred and forty-five dollars which he owed her, he made to her the bill of sale above mentioned, she being at the time in the house, and living with him in the manner before stated. An inventory seems to have been taken of the property; no separate valuation was, however, affixed to the different articles, but the whole was sold for the sum named. It is shown that the chief purpose of the inventory or list of the articles was to enable the property to be described in the bill of sale, which it was in contemplation to have drawn.

No act of delivery is testified to, except that the bankrupt says that he took Mrs. Massey around and showed the property to her. It is admitted that the parties continued to live together as before in the house; that no change was made; that the property continued to be used as it previously had been; and that Downing's name still continued on the door-plate, etc.

[42] On the hearing before JUDGE TREAT, the district court found that the bill of sale was void, and ordered the defendants to deliver the property therein described to the assignee.

From this order or decree the defendants appeal.

Daniel Dillon, for Appellants.

Hitchcock & Lubke, for Appellee.

DILLON, *Circuit Judge*.—1. Neither in his petition nor argument does the assignee base his right to the relief demanded upon the ground that the bankrupt did not in fact owe Mrs. Massey the debt which the bill of sale was made to pay, nor upon the ground that the sale was fraudulent because made to hinder and delay the creditors of Downing, the vendor.

The assignee places his case solely upon the statute of the State of Missouri relating to fraudulent conveyances, the tenth section of which is in these words:—

“Every sale made by a vendor of good and chattels in his possession or under his control, unless the same be accompanied by delivery at a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the thing sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith.” (Stats. 1865, p. 440, ch. 107.)

The sale by the bankrupt to Mrs. Massey is within the statute. It was an absolute sale of goods in the possession of the vendor. There was no delivery of the property, or if any, but a momentary one, and it was not followed by any actual or continued change of possession. This being so, the statute enacts that the sale “shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith.”

With the policy of a statute which, irrespective of the fact of fraud, or the intention of the parties to defraud, inexorably denounces as fraudulent *per se* all sales not accompanied by the [43] required delivery and followed by actual and continued change of possession, the courts have nothing to do, and it does not become them to question the legislative wisdom.

The purpose of the statute is to prevent the vendor from acquiring a false and delusive credit, and to prevent purchasers from being ensnared by means of secret sales.

Hence the provision that the sale shall, as required, be accompanied by delivery, and this followed by an actual and continued change of possession. The purpose of the enactment being to protect the public from deception, the *indicia* of a change of owners should be such as to accomplish this end. The new owner should fly his own and not his vendor's flag. This is the construction which the statute has received from the supreme court of the State. In *Clafin v. Rosenberg*, 42 Mo. 439, speaking of this statute, Wagner, J., remarks that “the vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands. . . . This necessarily excludes the idea of a joint or concurrent possession.”

On a critical examination of the case just cited, it will be seen that the exact point of the decision is that the possession of the vendee must, as against the vendor, be actual and *exclusive*.

This is the leading case upon the statute in question, and it has subsequently been reaffirmed and followed. (*Clafin v. Rosenberg*, 43 Mo. 593; *State etc. v. King*, 44 Mo. 238; *Lesem v. Herriford*, 44 Mo. 323; see *Twyne's Case*, and American notes, 1 Smith Lead. Cas. 33.)

We deem it prudent to observe that in the case at bar it is not necessary to go so far as to say that in no case can a sale be upheld where the vendor is in possession concurrently with, or rather subordinate to, the vendee or his agent. This may depend upon the existence of circumstances of a nature fairly to put the public upon notice.

[44] In this case there was no actual delivery, no continued change of possession, *no circumstances of any kind*, whereby either creditors or purchasers could know that any change of owners had taken place.

The defendants made a point that the situation of the parties to the sale and the property was such that no delivery and change of possession other than such as were made were practicable, and hence more ought not to be required.

The statute refers to "the situation of the property," not of parties; but, without emphasizing this suggestion, it seems to us that the statute has reference to property so situated as not to be at the time capable of immediate actual delivery and change of possession, such as growing crops, bulky articles, etc., and not to cases where the property is present and capable of being delivered to the vendee and retained in his possession and control.

Since in a case like the present, this court will follow the construction given to the local statute by the highest court of the State, it is not deemed necessary to follow the appellant's counsel into an examination of the decisions under the statute of Elizabeth, or the statutes of other States.

2. The defendants also contend that even if such be the construction of the statute, the assignee has no right to impeach the sale and have the property delivered to him. This view

cannot be maintained. If Downing had not gone into bankruptcy, any creditor of his could have subjected the property to the payment of his debt. In this respect the assignee represents the creditors. In consequence of Downing being adjudicated a bankrupt, his creditors are precluded from proceeding against him, and hence the assignee has the right given to him in terms by the bankrupt act, to proceed in the way which the present plaintiff is pursuing. (*Carr v. Hilton*, 1 Curt. 233; *Hillard on Bankruptcy*, 134, § 43, and cases cited; Bankrupt Act, 1867, §§ 14, 35.)

The result is that the order of the district court must be affirmed.

KREKEL, J., concurs.

Affirmed.

Note. Assignees in Bankruptcy Represent Both Bankrupt and Creditors, and may maintain actions for recovery of property fraudulently transferred. — Followed, *In re Duncan et al.* 14 Bank. Reg. 88; *Re Werner*, 5 Dill. 121. Cited, *Sedgwick v. Place*, 10 Bank. Reg. 48; *In re St. Helen's Mill Co.* 10 Bank. Reg. 418; *Martin v. Smith*, post, 93; *Bean v. Brookmire*, 2 Dill. 116; S. C. 7 Bank. Reg. 576. Denied, *In re Collins*, 12 Bank. Reg. 383.

Judgment affirmed on appeal, 17 Wall. 851.

[45] IN RE BECKERFORD, BANKRUPT.

BANKRUPT ACT—CONSTITUTIONALITY OF FOURTEENTH SECTION. — That part of the fourteenth section of the bankrupt act which adopts the State exemption laws in force in 1864 as the measure of property to be exempted under proceedings in bankruptcy, is uniform in its operation among the States, and is therefore constitutional.

EXEMPTION LAWS—HOMESTEAD. — By the exemption laws of Missouri, in force in 1864, a homestead may be set apart to a debtor out of a leasehold in real estate, or where such leasehold is not susceptible of division he may retain one thousand dollars out of the proceeds of it.

Before MILLER, J., and KREKEL, J.

THIS was an appeal from a judgment of the district court. At the time Beckerford was declared a bankrupt he was the owner of an unexpired term of a leasehold estate. The value thereof, as appeared from a sale made by the assignees, was one

thousand four hundred and ninety dollars. After the sale, the bankrupt, by his counsel, appeared before the register and claimed one thousand dollars of the proceeds of the sale in lieu of a homestead, which claim was resisted by assignees. The register thereupon certified the case to the district court of the eastern district, and TREAT, J., allowed the claim, and ordered the amount to be paid by the assignee. From this order the assignee appealed to this court.

A. Binswanger, for the Assignee.

In some twelve States no homestead exemptions existed in 1864, while in other States there is a great diversity as to the amount and value of the homestead exempt. In many eastern States a homestead of the value of only five hundred dollars is allowed exempt from execution, while in other States a much greater amount is exempt. In California five thousand dollars in value is exempt. In Wisconsin, Minnesota, and Arkansas there is no limitation as to value or extent of the homestead.

These exemptions not being uniform, fall within the inhibition of section 8 of article 1 of the constitution of the ^[46] United States, which gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States.

Congress cannot do that indirectly which it cannot do directly. Having no power to embody the various homestead exemptions of the several States in the law itself, it cannot do it indirectly by inserting such a clause as this, and there is no uniformity in the law as required by the constitution.

Charles E. Pearce, for the Bankrupt.

KREKEL, *District Judge*.—It is admitted that the bankrupt is the head of a family. The fourteenth section of the bankrupt law, after excepting certain specified articles, goes on to exempt "such other property as now is or hereafter shall be exempted from attachment or seizure, or levy on execution, by the laws of the United States, and such other property not included in the foregoing exceptions, as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the State in which the bankrupt has his domicile at the

time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year 1864." The laws of Missouri in 1864 exempted, among other property, from sale under execution or other process, "when owned by the head of a family or wife who shall be a *bona fide* resident of the State, any of his or her real estate not exceeding one hundred and sixty acres of farming land, or one lot in town or city in value one thousand dollars, at the date of such exemption, to be held and enjoyed by such party as a homestead." After providing for setting apart the homestead and ascertaining the value thereof, the law proceeds to enact that "when the real estate owned by the head of a family is of greater value than the amount allowed as the value of a homestead, and is not susceptible of division, such real estate may be sold, and the officer shall pay over to the defendant in such execution, the amount or value of a homestead exempted under the provision of the [47] act." The act has the usual provision, making it inapplicable to liabilities contracted before the taking effect thereof.

Two questions are presented for our consideration. First, can a homestead be carved out of a leasehold estate? and if so, secondly, is that part of the fourteenth section of the bankrupt law, making the exemption constitutional?

The language of the Missouri statute in reference to title is, that he or she must be owner of the real estate in order to have a homestead exempted. It is argued that there can be no such ownership as the law here contemplates, in a leasehold estate, and hence no homestead can be carved out of it. By the seventeenth section of the Missouri statutes, relating to executions, it is enacted that leases upon land for any unexpired term of three years and more, shall be subject to execution, and sold as real property.

The term "real property" is defined by the thirty-eighth section of the general provisions of the same statute as including every estate, interest, and right in land. These provisions seem to us to solve the question suggested in favor of the bankrupt, entitling him to have a homestead set apart in the leasehold owned by him at the time he was declared a bankrupt.

The second question presented and urged with earnestness is

the unconstitutionality of that part of section 14 of the bankrupt law, making the homestead exemption.

“Congress shall have power to establish uniform laws on the subject of bankruptcy throughout the United States,” is the language of the constitution by which the grant is made. It is insisted that the fourteenth section, already cited, having adopted the exemption laws of the State in which the bankrupt is domiciled, and these exemptions having no regard to uniformity, violate the constitutional provision authorizing *uniform* laws throughout the United States to be passed. It is obvious, from the language employed, that the uniformity here referred to was a uniformity among the States. If Congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform ^[48] throughout the United States. So far as the distribution of the bankrupt’s assets—the point under consideration—is concerned, the law is uniform. When viewed with reference to the State exemption laws, there is a uniformity which, on reflection, readily suggests itself. Though the States vary in the extent of their exemptions, yet, what remains the bankrupt law distributes equally among the creditors. Nor does the bankrupt law in any way vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor under the State laws than the unexempted part of his assets, the very thing that is attained by the bankrupt law, which, therefore, is strictly uniform.

To establish the uniformity contended for would have made it necessary for Congress to have virtually abrogated all State exemption laws. In doing so it would necessarily have legislated against the debtor class, by making whatever property was exempt, at the time of contracting, subject to distribution. This certainly would not have tended either to uniformity, justice, or equality. But the power to abrogate State exemption laws has never been claimed for Congress; on the contrary, such laws have been upheld and declared constitutional, when not applied to obligations incurred prior to the passage of the law. The idea of property in men has grown gradually weaker, and since the abolishment of imprisonment for debt, has nearly vanished.

In lieu thereof, the State, for its own purposes, and the well-being of the individual and family, has secured what are deemed necessities, against the claims of creditors, and directed the latter to look to the other property and integrity of his debtor for security.

Exemption laws now exist in all the States, and are deservedly becoming more and more popular. There is something so humane underlying them, that courts will not interfere unless they violate a plain mandate of the organic law.

[49] We find nothing in the provisions of the bankrupt law which we are now considering, that is in violation of the constitution of the United States. The order of the district court is affirmed.

MILLER, J., concurred.

Affirmed.

UNITED STATES v. ONE HUNDRED BARRELS SPIRITS.

INTERNAL REVENUE ACT—CONSTRUCTION—FORFEITURE.—Courts will not construe laws denouncing forfeitures as extending to property *bona fide* sold to third persons before seizure, unless the *intention* of Congress that the forfeiture should be absolute and instantaneous on the commission of the offense be manifest and unmistakable.

Id.—Revenue laws inflicting penalties for their violation are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention.

Id.—Under the Internal Revenue Act of July 13, 1866 (14 U. S. Stats. 98), a *removal* by a distiller of spirits, distilled by him, from the place of distillation to a bonded warehouse is a legal act, and it cannot be predicated of such a removal where this is the only overt act charged, that it was done to defraud the United States of the tax thereon so as to bring the case within those contemplated by section 14 of the above-mentioned act of Congress.

Id.—Under the Internal Revenue Act of July 13, 1866, as amended March 2, 1867 (14 U. S. Stats. 488), distilled spirits purchased by the claimant *bona fide* while they were in a bonded warehouse of the United States, to whose collector he paid the taxes due thereon, cannot afterwards be seized in his hands and condemned as forfeited by reason of the previous failure of the distiller, in the course of the manufacture thereof, to keep the books and to make the tri-monthly reports required of him by law.

Id.—**REPEAL OF STATUTE BY IMPLICATION.**—As repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the

repugnance is positive, and then only to the extent of such repugnance. *Held*, that the fifth section of the Act of March 31, 1868 (15 U. S. Stats. 58), is not a repeal of that part of the twenty-fifth section of the Act of March 2, 1867 (14 U. S. Stats. 483), which denounces penalties against distillers for failing to make the entries and reports required of them by law.

[50] INTERNAL REVENUE ACT—FORFEITURES.—The legislation of Congress respecting forfeitures against distillers reviewed, and the conclusion reached that it showed an uniform policy, from the beginning, not to extend forfeitures to property in the hands of innocent third persons.

LD.—ESTOPPEL.—Whether under the peculiar provisions of the internal revenue acts the government, by receiving and retaining the taxes paid to it on spirits, in a bonded warehouse, by an innocent purchaser, would be estopped as against such a purchaser to enforce a forfeiture by reason of a prior default on the part of the distiller, the court gave no opinion.

Before DILLON, J., and KREKEI, J.

THIS is a proceeding *in rem* commenced in the United States district court for the eastern district of Missouri, September 7, 1868, against one hundred barrels of distilled spirits, claiming that they had been forfeited to the United States for violations of internal revenue laws. It is alleged in the information, and admitted by the claimant in his answer, that seizure was made on land, in St. Louis, by the collector, September 1, 1868.

The fourth count of the information is in these words:—

“Fourth. That the said one hundred barrels of spirits were manufactured at some place within the United States to the said district attorney unknown, and between the first day of September, A. D. 1866, and the date of said seizure, by some person or persons to the said attorney unknown, and were there and then goods and commodities, on which tax was there and then imposed by provisions of law, and the same were removed from the place where distilled, with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes in such case made and provided.”

The fifth count in the information is as follows:—

“Fifth. That said spirits were manufactured at some place within the United States, to said attorney unknown, between September 1, 1866, and the date of the seizure, September 1, 1868, by the use of certain boilers, stills, and ^[51] other vessels, of which said unknown person or persons there and then had the superintendence, and that during the time said unknown person or persons carried on the business aforesaid, and both

before said spirits were distilled, and while they were in his or their possession, said unknown person or persons neglected and refused from day to day to make or cause to be made a true and exact entry in a book kept in such form as the commissioner of internal revenue has prescribed, of the number of pounds and gallons of materials used for the purpose of producing spirits distilled, the number of gallons of spirits placed in warehouse, and the proof thereof, the number of gallons sold, with the proof thereof, and the name, etc., of the person to whom sold, contrary," etc.

The sixth count is the same as the fifth just quoted, as to the manufacture of the spirits, and charges that the person having the superintendence of the distillery, "both before the said spirits were distilled and afterward, and while the same were in his possession, did neglect and refuse on the 1st, 11th, and 21st days of each and every month, or within five days thereafter, to render the assessor or assistant assessor, an account in duplicate, taken from his books in the particulars hereinbefore (in the fifth count of the information) mentioned, all of the facts occurring after the last day of account preceding, contrary, etc., whereby and by force of said statutes the said property became and is forfeited to the uses in said statutes specified."

One Henderson, of New Orleans, appeared as claimant, and filed an answer denying the material averments of the information as to grounds of forfeiture, and alleging "that said one hundred barrels of spirits were purchased by him while the same were in a bonded warehouse, and that he, the claimant, paid the tax imposed thereon by law, before he moved the same from said bonded warehouse, etc.

The parties waived a jury, and submitted the cause to the court, upon the following agreed statement of facts:—

[53] "It is stipulated and agreed as follows:—

"First. That John Henderson, claimant, purchased said spirits while in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which they were made; that the claimant paid the United States collector the taxes due on the said spirits, and moved the same from the said warehouse, according to law, without knowledge on the part of Henderson at any time before seizure, of

any fraud on the part of the distiller, either actual or alleged; that he was an innocent and *bona fide* purchaser; and himself paid the tax on the spirits.

“Second. That Henderson shipped them to St. Louis, and had constructive possession thereof when they were seized.

“Third. That the said spirits were manufactured and distilled in Louisiana, in May and June, 1868, in a distillery run in the name of N. Johnson, by the use of boilers, stills, etc., of which Johnson was superintendent and owner; and that each and all the facts in the fifth and sixth counts of information (above copied) averred, as to a certain unknown person, are true as to said Johnson and the said spirits.

“Fourth. That the fourth count in the information (above copied) is true; but that the said Henderson, claimant, subsequently to the removal from the distillery, and before the removal from the bonded warehouse, and before the seizure, paid the tax on said spirits, and was a *bona fide* and innocent purchaser thereof.

“Fifth. That said Henderson was not a purchaser from the United States, and the United States at no time sold said spirits.”

No evidence was produced, and on the facts above stipulated the court adjudged that the property in question was not forfeited. To reverse this judgment the United States sued out the writ of error which brings the case into this court.

The attorney for the United States bases his claim for a forfeiture by reason of the facts alleged in the fourth count of the information above copied, upon section 14 of the Act of July 13, 1866. (14 U. S. Stats. 151.)

[53] “Sec. 14. That in case of goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper, or intended to be made use of, for or in the making of such goods and commodities, *shall be removed*, or shall be deposited or concealed in any place, with the intent to defraud the United States of such tax, or any part thereof, *all such goods and commodities*, and all such materials, utensils, and vessels, respectively, shall be forfeited, ‘together with casks, vessels, case, etc., containing such goods, and every person guilty of or concerned in such removal, deposit, or con-

concealment,' with intent to defraud the United States of such tax, shall be liable to a fine or penalty not exceeding five hundred dollars."

It is proper here to notice that section 45 of the same act (14 U. S. Stats. 163) relates specifically to the removal of spirits from places where distilled, and is in substance as follows:—

"Sec. 45. That any person who shall remove any distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law, shall be liable to a fine of double the amount of tax imposed thereon, or to imprisonment for no less than three months. All distilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and after the assessment of the tax thereon may be sold by the collector for the tax and expenses of seizure and sale." After providing for mode of procedure and burden of proof, the section continues thus: "And any person who shall aid or abet in the removal of distilled spirits from any distillery otherwise than to a bonded warehouse, as provided by law, or shall aid in the concealment of spirits so removed, shall be liable, on conviction thereof, to a fine not less than ^[54] two hundred dollars nor more than one thousand dollars, or to imprisonment for not less than three months nor more than twelve months."

The only other sentence in the section provides for the punishment of illegal removal of spirits from any bonded warehouse.

The fifth count of the information above copied, which alleges the failure of the distiller of the *res* to keep the book and make the entries prescribed by the commissioners, and the sixth count which avers the failure of the distiller to make certain returns, are based by the district attorney upon section 31 of the Act of July 13, 1866 (14 U. S. Stats. 157), and section 25 of the Act of March 2, 1867 (14 U. S. Stats. 483), and are claimed by the district attorney to be in substance the same as sections 57 and 68 of the Act of June 30, 1864 (13 U. S. Stats. 243, 248).

Section 31 in the Act of 1866 is of the same general char-

acter as section 57 in the Act of 1864; section 68 in the Act of 1864 was the one which denounced the penalty for the acts or omissions made illegal by section 57, but no section corresponding to section 68 was contained in the Act of July 13, 1866. This omission was supplied by the Act of March 2, 1867, section 25, which is of the same general character with said section 68 of the Act of 1864; but it contains some additions, particularly in relation "to materials fit for use in distillation, found on the premises," which are regarded by the claimant as being very material, as showing the intention of Congress not to forfeit spirits unless found upon the premises of the distiller.

Respecting the fifth and sixth counts in the information, the district attorney, as above stated, relies upon section 31 of the Act of July 13, 1866, and section 25 of the Act of March 2, 1867. Section 31 requires the distiller to keep a certain book, and to make true and exact entries of certain facts therein, and also to make tri-monthly accounts, taken from the books, etc. It is admitted that the distiller of the liquor seized did not comply with the above-mentioned requirements ^[55] of the law, and this section need not here be further alluded to.

The twenty-fifth section of the Act of March 2, 1867, before mentioned, is material in the present controversy, and is in these words:—

"Sec. 25. That the owner, agent, or superintendent of any still, who shall neglect or refuse to make true and exact entry and report of the same, or do or cause to be done any of the things by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties now by law provided, forfeit for every such neglect or refusal all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, and all materials fit for use in distillation, found on the premises, together with the sum of five hundred dollars for each offense, with costs, and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year," etc. (14 U. S. Stats. 483.)

It is admitted that the spirits which are now in controversy were manufactured in May and June, 1868, at which time the

Act of March 31, 1868 (15 U. S. Stats. 58), had gone into effect and was in force; and it is contended by the claimant that the fifth section of this act repeals, by implication, the penalties denounced by previous acts, or that, being the later expression of the legislative will, it is the one which fixes the rights of the parties. It is as follows:—

“Sec. 5. That every person engaged in carrying on the business of a distiller who shall defraud, or attempt to defraud, the United States of the tax on spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars, nor more than five thousand dollars, and be imprisoned not less than six months, nor more than three years. (15 U. S. Stats. 59, § 5.)

[58] The district court was of opinion that the Act of March 2, 1867 (§ 25), taken in connection with the Act of 1866, did not work a forfeiture *eo-instanti*; that the language of those sections is *in futuro*, and therefore does not apply to property which, prior to the seizure, has passed into the hands of a *bona fide* purchaser, and accordingly gave judgment that the property in question was not forfeited.

C. H. Krum, District Attorney for United States, Plaintiff in error.

E. T. Allen, for Claimant, defendant in error.

DILLON, *Circuit Judge*.—The property in controversy between the United States and the claimant consists of one hundred barrels of distilled spirits. The seizure was made Sept. 1, 1868, in the city of St. Louis. It is admitted by the written stipulation of the parties, that these spirits were manufactured by one Nimrod Johnson, in the State of Louisiana, in the months of May and June, A. D. 1868; and that the claimant, Henderson, purchased them while they were in a bonded warehouse in New Orleans, after the same had been placed there by the owner of the distillery; that the claimant paid the United States collector the taxes due thereon, and moved the same from the

warehouse according to law, without knowledge on his part, at any time before the seizure, of any fraud on the part of the distiller, either actual or alleged. And it is distinctly admitted by the government that the claimant is a *bona fide* purchaser of the property. Judgment of forfeiture is sought, not for any violation of the law by the claimant, but for the violation of it by the distiller, without the knowledge of the claimant, and at a period prior to the time when the *res* was placed in the government warehouse, and when the government collector received from the claimant the amount of taxes due on the property. [57] If the government is right, the claimant loses not only the spirits, but the large amount of taxes which he paid thereon—loses these entirely, or as to the one is thrown on an uncertain resort upon his vendor, and as to the other upon the sense of justice of the government. Where it is claimed that a law works such results, against which it is almost impossible for a purchaser to guard, the *intention* that it should do so ought to be unmistakable. Before proceeding to examine the several grounds of forfeiture relied on by the United States, it may be advisable to notice two general propositions of law adverted to by counsel, and which bear upon the question to be determined. The first is, that after the repeated decisions of the supreme court of the United States, it is to be taken as settled doctrine that when a statute in terms denounces a forfeiture of property as a penalty for violation of law, without alternative of value, or other qualifications or provisions, or language showing a different intent, the forfeiture takes place absolutely and instantaneously, on the commission of the offense; title vests in the government from that moment, and it is not within the power of the offender or former owner to defeat the forfeiture by a subsequent transfer, even to a *bona fide* purchaser. (*United States v. One Thousand Nine Hundred and Sixty Bags Coffee*, 8 Cranch, 398; *United States v. Grundy et al.* 3 Cranch, 338; *Wood v. United States*, 16 Peters, 342; *Caldwell v. United States*, 8 How. 366; *Clifton v. United States*, 4 How. 242, 248.)

Another undisputed principle of law is that penalties annexed to violations of general revenue laws do not make such laws penal in the sense which requires them to be construed strictly. Nor, on the other hand, are they to be construed with an excess

of liberality. But it is the duty of the court to study the whole statute, its policy, its spirit, its purpose, its language, and giving to the words used their obvious and natural import, to read the act with these aids in such way as will best effectuate the intention of the legislature. Legislative intention is the guide to true judicial interpretation. ^[58] (*Taylor v. United States*, 3 How. 197, 210; *Cliquot's Champagne*, 3 Wall. 114.)

The way is now cleared for a consideration of the several grounds of forfeiture insisted upon by the government. We shall notice first that which is set out in the fourth count of the information, the words of which are given above. The substance of this is, that these spirits being subject to a tax imposed by the internal revenue law were removed from the place where distilled with intent to defraud the United States of such tax. By whom removed, or to what place removed, is not alleged in the information. But in the agreed statement of facts it is admitted that the spirits were "placed in a bonded warehouse in New Orleans, *by the owners of the distillery* at which they were made; that the claimant paid the taxes thereon," etc. It is also admitted "that the fourth count in the information is true; but that Henderson, claimant, subsequently to the removal from the distillery, and before removal from the bonded warehouse, paid the tax on the spirits, and was a *bona fide* purchaser."

Thus the facts admitted by the parties are, that the spirits were removed by the distiller, to and *by him* placed within the bonded warehouse of the government, and it is charged in the fourth count of the information that the removal therein alleged was made with intent to defraud the United States of the tax imposed by law upon such spirits. And, as noticed above, the written stipulation admits that the fourth count in the information is true.

The attorney for the United States maintains the sufficiency of this ground of forfeiture under the facts thus alleged and admitted, and relies upon section 14 of the Act of July 18, 1866, which, together with the substance of section 45 of the same act, is set out in the statement of the case preceding this opinion. (14 U. S. Stats. 151.) Section 14 is general and broad enough in its terms to embrace the removal of spirits on which there is a tax, when this is done with intent to defraud the United

States of the tax; but section 45 is the ^[59] one specifically relating to the removal of spirits from the place where they are distilled. By this section the removal of "distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse as provided by law," is prohibited, and is made punishable by penalties differing from those provided in section 14. It is, then, not an illegal act to remove spirits from the distillery to the bonded warehouse. It is to secure the government the tax that they are thus allowed to be removed. How it can reasonably be predicated of a removal of spirits by the distiller into a bonded warehouse of the government, which is under the custody of its own officer, that it was done with intent to defraud the United States of the tax thereon, is not readily perceived, and is not explained in the pleadings, in the admission of facts, nor in the argument of counsel. Without putting a strained or nice construction upon the language of the fourth count, and of the written admission respecting it, it is our opinion that the case, as made, does not fall within those contemplated by the above-mentioned section 14, of the Act of July 13, 1866. The removal is the overt, illegal act alleged, and this was rightful; all that is left of the count under consideration is the intent with which the removal was made. We have said above that it is difficult to see how it could have been made to defraud the United States of the tax, and a mere intent to defraud, formed or existing in the mind of the distiller, which intention has never been executed or attempted to be, is not made a ground of forfeiture. The only execution or attempt to execute the unlawful intent alleged, viz., to defraud the United States of the tax on the spirits, is the removal of the spirits by the distiller to the warehouse of the United States, which removal was a legal and not an illegal act.

For these reasons, our opinion is that the spirits in controversy were not forfeited by reason of the facts set forth in the fourth count of the information, and in the written admissions of the parties.

The other grounds of forfeiture relied on by the government ^[60] are those set forth in the fifth and sixth counts of the information, which allege the failure of the distiller of the

spirits in question to make the entries required by law in the book prescribed by the commissioner, and to make tri-monthly reports from the said book. It is admitted that the allegations of the information in this respect are true. By examining critically the language of the information and of the written stipulation, it will be seen to admit of doubt whether the distiller Johnson was guilty of the afore-mentioned neglects at and during the period when the spirits in controversy were distilled, or whether his neglect was before or after the distillation of these spirits; but it is clear that the neglect of the distiller in this respect existed at a time when these spirits were in his possession.

Suppose, as the government contends, that section 25 of the Act of March 2, 1867, applies to the case, and that the distiller was not in default as to entries and reports *at the time* the spirits in question were made, but that he made default in these respects, while these spirits remained in his possession, are they forfeited by this section, which includes "all spirits made by or for him," or is this language limited to such spirits as are made by or for him while the neglect or refusal to make the required entries or reports continues?

As the counsel for the claimant has not rested his case upon any such ground, we waive its consideration, and proceed to examine the questions made by the respective counsel, so far as it is deemed necessary to do so. The attorney for the government bases the claim to condemn the property as forfeited by reason of the facts alleged in the fifth and sixth counts of the information, upon section 31 of the Act of July 13, 1866 (14 U. S. Stats. 157), which imposes upon the distiller the duty of making the entries and tri-monthly report, and upon section 25 of the Act of March 2, 1867 (14 U. S. Stats. 483), which denounces the penalty of forfeiture for the neglect or refusal of the distiller to perform this duty. But to what the forfeiture extends, or when it is worked, are disputed questions in ^[61] the case. The attorney for the claimant contends that the above-mentioned section 25, as to penalties, is repealed or superseded by section 5 of the Act of March 31, 1868 (15 U. S. Stats. 58), which was in force when these spirits were made, and by which the forfeiture is limited to spirits found on the premises, or at

most, to those owned by the fraudulent distiller, if found elsewhere.

If the Act of March 31, 1868, could be considered as *entirely* repealing the previous act, the conclusion of the claimant's counsel would be correct, viz.: That under the Act of 1868, spirits which before seizure had passed through a bonded warehouse from the hands of the distiller into those of the *bona fide* purchaser, would not be forfeited for the previous frauds or acts of the manufacturer. But the law does not favor repeals by implication, particularly in revenue statutes, the provisions of which, to prevent fraud, are complicated, and enacted frequently at different times to meet special exigencies or defects in previous enactments. To operate a repeal by implication the repugnance must be clear and positive, so as to leave no doubt as to the intent of Congress. (*United States v. Sixty-seven Pkgs. Books*, 17 How. 85, 93.) By recurring to the fifth section of the Act of 1868, it will be seen that it is limited to punishing distillers for *defrauding* or *attempting to defraud* the *United States of the tax* on spirits distilled by them; and to convict the distiller, or to condemn property as forfeited under this statute, an intent to defraud must exist in the mind of the distiller, and be established by evidence. Whereas, under the Act of 1866 (§ 31), and of 1867 (§ 25), an intent to fraud existing in the mind of the distiller is not made essential; if he neglect to make the entries or report required, the forfeiture in law attaches, although he might be able to show as matter of fact that his neglect was innocent of any fraudulent design. The penalties in the fifth section of the Act of 1868 being different from those in the former act, it is a repeal by implication so far as it and the provisions of former acts provide ^[and] *for the same offense, but no further.* (*Norris v. Crocker*, 13 How. 439; *Sedgw. on Const. and Statutory Law*, 125; *State v. Whitworth*, 8 Port. 434.) Being of opinion that the Act of 1868 is not a repeal of that part of the twenty-fifth section of the Act of 1867, which denounces penalties against distillers for failing to make the entries and reports required of them, it is necessary now to consider another position taken by the claimant's counsel, viz.: Admitting that the twenty-fifth section of

the Act of 1867 is yet in force, and is the one applicable to this case, still the spirits in controversy are not, under the agreed facts, forfeited by virtue of its provisions, because they were not found on the premises of the distiller, but in the possession of an innocent purchaser. The argument is that the words, "found on the premises," relate to and qualify the whole list of forfeited articles, including distilled spirits. Upon an examination of the language of this section in the light of its legislative history, adverted to in the statement of the case, and in the light of other provisions of the statutes relating to forfeitures denounced against distillers, it is our opinion that his position is substantially correct; in other words, that it was not the intention of Congress to denounce an absolute and instantaneous forfeiture on the commission of the offense of all spirits, but only those either found on the premises at the time of seizure or information given, or if found elsewhere, still owned by the party guilty of the wrongful act or omission. This conclusion, reached it must be confessed after some hesitation, and adopted with some lingering distrust of its soundness, rests full more upon the general spirit and purpose of the legislation of Congress respecting the rights of third persons than upon the particular words of the twenty-fifth section of the Act of 1867, if these stood alone with nothing beyond to aid in their interpretation. This conclusion is fortified by supposing Congress in its legislation to have been regardful of the ordinary sense of justice, and not to have designed to make the innocent suffer ^[63] for the acts of the guilty, and to visit the laches of officers of the revenue upon those guilty of no wrong and no neglect. And it is still further strengthened if we have regard alone to considerations of mere policy. Revenue is the sole purpose of all the complicated official machinery pertaining to the manufacture of spirits. The duty levied is high; the temptation to fraud correspondingly great. Congress will be presumed to have seen, unless the contrary clearly appears, that revenue would be promoted by making it safe to buy manufactured spirits, and would be injured by legislation of a contrary character, by which a "secret taint of forfeiture is indissolubly attached to the property so that at any time and under any circumstances, within the limitations of law, the United States might enforce their rights against innocent

purchasers." (Per Story, J., *United States v. One Thousand Nine Hundred and Sixty Bags of Coffee*, 8 Cranch, 398, 406.) The policy of Congress to confine the forfeiture to the property of the guilty, at least not to extend it to innocent persons, may be seen by section 180 of the Act of 1864 (13 U. S. Stats. 306), which protects *bona fide* purchasers from forfeitures for frauds. The fraudulent vendor forfeits value, but the article bought *bona fide* and paid for cannot be pursued into the hands of the purchaser. So in the Act of July 13, 1866 (14 U. S. Stats. 153), if the distiller fails to pay the tax for carrying on his business (§ 23), or fails to give bond, or gives a false or fraudulent notice (§ 24), he forfeits only such liquors as are owned by him, or found upon the premises, which evidently means owned by him at the time of seizure or date of information given. So by the fifth section of Act of March 31, 1868 (15 U. S. Stats. 58), so often mentioned, it is provided that the distiller who defrauds, or attempts to defraud, the United States of the tax on spirits distilled by him, shall forfeit, among other things, "all distilled spirits and raw materials for the production of distilled spirits, found in the distillery and on the distillery premises." This section, as above observed, does not repeal all prior laws inflicting penalties and forfeitures upon distillers, but repeals ^[64] them only so far as they relate to the same offense. But it being in *pari materia* with the twenty-fifth section of the Act of March 2, 1867, relied on by the district attorney, and which governs this case, it may be properly resorted to when endeavoring to discover the meaning of that section. Under the Act of 1868, spirits, which had passed into the hands of a *bona fide* purchaser, and not found in the distillery building or premises, would not be liable to be condemned as forfeited. So by the Act of July 20, 1868 (15 U. S. Stats. 142, § 44), passed soon after the spirits in controversy were made and before they were seized, but which saves forfeiture already incurred (15 U. S. Stats. 166, § 105), all obscurity as to extent of forfeiture is removed, and the forfeiture is in terms limited to "distilled spirits owned by such person (the offending distiller) wherever found, and all distilled spirits and personal property found in the distillery," etc. (15 U. S. Stats. 142, § 41, and see §§ 5, 7, and 19, of same statute.) This legislation shows quite satisfactorily an uniform

policy on the part of Congress, from the beginning, not to extend the forfeiture to innocent third persons.

In the light of these considerations, and of this legislative policy, we may now recur to the twenty-fifth section of the Act of March 2, 1867, which is the one relied on by the government, and we repeat it as our opinion that, under it a neglect or refusal by a distiller to make entries and reports as required by law does not forfeit spirits not "found" on the premises, and not at the time when "found" the property of the offending distiller. It would, indeed, be strange if such a neglect or refusal, which is not necessarily fraudulent in fact, as we have before stated, should have the effect to forfeit spirits in the hands of *bona fide* purchasers, when by other provisions of the statutes, as, for example, that of March 31, 1868, an actual fraud, accompanied with a fraudulent intent, would not have that effect. The judgment of the court is, that under the twenty-fifth section of the Act of March 2, 1867, a forfeiture, *eo-instanti*, is not worked for omissions of ^[65] the distiller to make the entries and reports required of him. This view, if correct, results in affirming the judgment of the district court, and renders it unnecessary to consider the other proposition of the claimant's counsel, which is, that if forfeiture attached to these spirits, *eo-instanti*, with the commission by Johnson, the distiller, of the offenses charged, the United States *waived* any right of property acquired by such forfeiture when they accepted from Henderson, the claimant, the amount of the taxes due on these spirits and surrendered them into his possession, he being innocent of fraud.

We content ourselves with remarking that the proposition, as stated, is of questionable correctness, for *waiver* would imply a power in the revenue officers which they do not possess, and perhaps also a knowledge of the forfeiture, which it is not shown they had, when the taxes were received from the claimant and the spirits were surrendered to him. If any proposition could be maintained, it would be the one that in view of the peculiar provisions of the law for detecting frauds, the ample facilities it supplies its officers, its system of bonded warehouses, the government by *accepting and retaining the taxes paid to it by the claimant* is *estopped* to say the property all the time belonged to

it by reason of a previous forfeiture of title by the vendor of the claimant. Whether this view is correct, or whether the case could be successfully distinguished from those in which the supreme court has held under the customs revenue acts, that the forfeiture might be enforced against the property in the hands of innocent and subsequent purchasers, we pass without deciding, resting our determination of this case upon the grounds before stated.

The judgment of the district court is affirmed.

KREKEL, J., concurs.

Affirmed.

[C] BERRY v. FLETCHER ET AL.

EVIDENCE—COMPETENCY OF PARTIES TO TESTIFY.—Where by the laws of a State parties are both competent and compellable to testify, the same rule, under the legislation of Congress, applies to civil actions in the federal courts sitting therein; and one of the parties may in such an action be *compelled* to testify at the instance of the adverse party.

Before DILLON, J., TREAT, J., and KREKEL, J.

PER CURIAM.—Trespass for injuries to the person and property of the plaintiff. The plaintiff's counsel called, and asked to have sworn, as a witness, one of the defendants; to which the defendant's counsel objected on the ground that one party could not *compel* an adverse party to testify. It was conceded by counsel that under the laws of the State of Missouri, parties were both competent and compellable to testify in actions like the present. The court held, referring to the judiciary act (§ 34), the Act of July 6, 1862 (12 U. S. Stats. 588, § 1), and the Act of July 2, 1864 (13 U. S. Stats. 533, § 3), and of March 3, 1865 (13 U. S. Stats. 533), that the objection was not well taken, and the defendant was sworn as a witness at the plaintiff's instance. (See *Rison v. Cribbs*, *post*.)

Mr. Glover, for the Plaintiff.

Mr. Noble, for the Defendants.

The objection was sustained by the court.

[NOTE. — In *Tenny v. Collins*, 4 Bank. Reg. 156, it was held by the United States district court, eastern district of Missouri, that upon a motion to set aside the discharge granted to a bankrupt, the wife of the bankrupt cannot be required to testify as a witness against her husband.

Respecting the point, TREAT, J., remarks: "The plaintiffs also summoned the wife of the bankrupt, who was sworn as a witness, and were proceeding to examine her in relation to the conveyance, in 1866, of land held in her name by herself and husband, to her father in payment of other debts, and as a security for debts upon which he was jointly liable with the bankrupt.

Objections were interposed, that while the bankrupt act provided for the examination of the wife of the bankrupt before the register, for the [67] purpose of ascertaining the condition of his estate, it did not alter the common rule that the wife could not be a witness for or against the husband in a motion to set aside the discharge.]

Competency of Parties to Testify. — Cited, *Insurance Co. v. Stanchfield*, post, 429.

BERRY v. FLETCHER ET AL.

TRESPASS — JOINT AND SEVERAL TRESPASSERS — LIABILITY. — All who instigate, promote, or co-operate in the commission of a trespass, or aid, abet, or encourage its commission, are guilty.

ID. — But the mere presence of persons at the commission of a trespass which they did not advise or abet, and in which they did not participate and had no interest, will not make them trespassers.

ID. — VERDICT OF JURY. — Where the defendants are sued jointly in trespass, the jury must find a single verdict, and assess damages jointly against such as are proved guilty of the *same* trespass.

ID. — DAMAGES. — In trespass against several, the jury should estimate damages according to the most culpable of the joint trespassers.

DAMAGES, EXEMPLARY AND COMPENSATORY. — All damages are referred by the law either to compensation or punishment. Compensation is to make the party injured whole. Exemplary damages are given, not to compensate the plaintiff, but to punish the defendant.

ID. — Circumstances stated which will authorize the jury to give exemplary damages.

Before DILLON, J., TREAT, J., and KREKEL, J.

THIS was an action of trespass brought by the plaintiff, the editor and proprietor of a newspaper in the town of Richmond, in Missouri, against Thomas C. Fletcher, late governor of that State, and also against Montgomery, a colonel commissioned by Governor Fletcher under the act of the State legislature, authorizing the organization and employment of the State militia to aid in the execution of civil process, and against certain other persons, citizens of the town of Lexington. Demurrers to cer-

tain special pleas, justifying the acts complained of under the above-mentioned act of the legislature were sustained, as by the State practice adopted in this ^[68] court the matters pleaded in justification were admissible under the general issue.

The nature of the action, the issues, and other necessary facts, appear in the charge of the court. On the trial no attempt was made to justify the alleged trespasses.

DILLON, *Circuit Judge*, in summing up to the jury, said, the other judges concurring:—

1. *As to the pleadings and issues.* This is an action of trespass, brought by the plaintiff, now a citizen of Kansas, for injuries alleged to have been done by the defendants to his person and property.

The first count in the declaration alleges that the defendants assaulted, beat, and imprisoned the plaintiff, carried him from Richmond to Lexington, in this State, imprisoned him for four days, and by putting him in fear of his life, compelled him to sign a false and scandalous paper, against his will, etc.

The second count alleges that the defendants destroyed and damaged the printing-press, furniture, type, cases, and fixtures of the plaintiff's printing-office, and also a large quantity of printed forms and blanks, the property of the plaintiff, and belonging to him as assistant United States assessor. The defendants plead not guilty, and the burden is upon the plaintiff to establish to your satisfaction, by the evidence, the trespasses, or some of them, alleged in the declaration.

2. *As to the defendant, Montgomery.* The court will first instruct you with reference to the defendant, Bacon Montgomery.

Evidence in the case has been laid before you tending to show that Montgomery was in command at Lexington of certain men enrolled and called into service under the State law, as militia; that certain persons from Richmond called upon him, making complaints against the plaintiff, and exhibiting an article in the plaintiff's newspaper, accompanied with oral statements concerning the plaintiff, and that Montgomery thereupon issued an order to a detachment of his men to proceed to Richmond and arrest the plaintiff, and to injure or ^[69] destroy

his printing-press, and to bring the plaintiff before him at Lexington.

If you find that such an order was issued by Montgomery, and that the plaintiff was arrested and seized, forcibly carried to Lexington, deprived of his liberty by force and against his will, this sustains the first count in the declaration, and the plaintiff is entitled to a verdict against Montgomery, for his damages, by reason of these unlawful acts.

If, pursuant to such order, you find that the plaintiff's printing-press, and the other property mentioned in the second count of the declaration, was injured or destroyed, the defendant, Montgomery, is also liable for the damages thus proved to have been occasioned.

It is proper to be added that the defendant, Montgomery, has given no evidence to *justify* in law his causing the plaintiff to be arrested and imprisoned, or his property to be injured, and hence, if you find that he caused the plaintiff to be arrested and imprisoned, or his property to be injured, as alleged in the declaration, the plaintiff will be entitled to recover. The rule by which you are to ascertain, or measure, the plaintiff's damages, will be hereafter stated.

3. *As to the other defendants.* You must also consider the case of the other defendants, and determine whether they, or any of them, are liable for, or in respect of, the trespasses mentioned in the declaration. All of these defendants may be liable, or part of them only may be liable, or none of them; and, therefore, it is necessary that you consider the case of each defendant separately in determining whether he is, or is not, guilty of the injuries for which the plaintiff sues.

You will bear in mind that the court is now speaking of the defendants other than Montgomery; and that you may the better apprehend the controverted question between these defendants and the plaintiff, the court will state the claims of the respective parties in this regard, and the law applicable thereto.

[70] It is claimed by the plaintiff that the defendants, other than Montgomery, were present when the latter issued his order to arrest the plaintiff, and to injure his press and printing-office, or were present after his arrest, and while he was in confinement under such arrest, and that they were instigators, pro-

moters, co-operators with Montgomery, in the commission of the trespass complained of in the declaration; that they consulted with Montgomery in respect thereto, and advised and encouraged him to issue the order to arrest the plaintiff and injure his property, or that pending his arrest, they advised and encouraged its continuance, and the perpetration of the other wrongs to his person, complained of. If you find such to be the facts, then the defendant or defendants who thus participated in the wrongs ordered and done by Montgomery (if you find that he committed the trespasses complained of) are guilty with the said Montgomery, and you should find accordingly. On the other hand, it is claimed by the defendants, other than Montgomery, that they did not instigate, promote, or co-operate with Montgomery, or consult with him, or advise and encourage him to commit any of the grievances for which the plaintiff sues; that if present, they were there for a lawful purpose, and were spectators, and in no way participators in what Montgomery did, or ordered to be done; that Montgomery was acting in a military capacity, and that what he did and ordered was done as such officer, out of his own head, without consulting with the defendants, or being advised and encouraged by them in the matter. If you find such to be the facts, then the defendant or defendants, thus free from any participation in the trespasses complained of, cannot be held guilty of such trespasses, and are entitled to a verdict in their favor.

4. *As to trespasses by several and liability therefor.* The defendants are sued jointly for the same alleged trespasses. As before stated there are two counts in the declaration, the first for injuries to the plaintiff's person, the second for injuries to his property. If you find for the plaintiff you must ^[71] find a single verdict and assess damages jointly against such of the defendants as you find guilty. You cannot find that part of the defendants are guilty alone, under the first count, and the others alone guilty under the other count, and then bring in a joint verdict against all. But you may find all of the defendants, or part of them, guilty under both counts, or under either, provided all returned guilty are found guilty of the same and not different trespasses. In short, those of the defendants (if any) whom you find guilty must be found guilty of those tres-

passes only which they committed jointly, and the damages must be assessed with sole reference to such acts. But, in respect of a trespass committed jointly by several persons, the jury may estimate the damages according to the most culpable; for this is the damage sustained by the plaintiff, for in cases of trespass there can be no apportionment of damages. (2 Stark. Ev. 807; 2 Hillard on Torts, 464, pl. 25, and cases there cited.)

5. *As to damages.* If under the evidence and the foregoing instructions you find the defendants, or any of them, guilty, it will then be your duty to fix the amount of damages to which, as against such, the plaintiff is entitled. This makes it necessary for the court to instruct you with reference to the rules adopted by the law to guide and govern juries in measuring and ascertaining such damages. Damages are of two kinds; (1) actual damages; (2) exemplary or vindictive damages. The plaintiff claims to recover both.

Actual damages are such as will *compensate* the plaintiff for actual injuries sustained, and those injuries which naturally flow from the wrongs and trespasses proved, including injuries done to the printing-press, office, and property, mentioned in the declaration. For such actual injuries, if proved, and to the extent proved, the plaintiff is entitled to such sum as will fully compensate him therefor, and he is entitled to no more, unless he has made out a case for exemplary damages.

All rules of damages are referred by the law to one of two [72] heads, either compensation or punishment. Compensation is to make the party injured whole. Exemplary damages is something beyond this, and inflicted with a view not to compensate the plaintiff, but to punish the defendant.

The circumstances which will authorize the infliction by the jury of exemplary damages have been very correctly stated by the supreme court of Missouri, and as this is a trial in that State for a transaction originating therein, this court will adopt the language of that court on this subject. It says: "To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, or else the amount sought to be

recovered should be confined to compensation." (*Kennedy v. R. R. Co.* 36 Mo. 351.)

It is claimed by the plaintiff, but denied by the defendant, that this is a case for exemplary damages. Under the rules given, this is a matter which the law confides to the sound judgment of the jury, and they will inquire and decide whether, considering all the circumstances in evidence, the case is one in which, in addition to compensating the plaintiff, the defendants should also be punished in damages, for example's sake. If you decide not to give vindictive damages, then the amount of actual damages you will fix from the evidence before you. If you decide to go beyond the limits of compensation to the plaintiff, and enter into the field of exemplary damages, then it is your duty to look at all of the circumstances under which the defendants acted, at those which are claimed to aggravate, and to those which are claimed to mitigate the acts complained of; to put yourselves in the situation of the parties. Sedately consider these, and thus ascertain the exact and real nature and circumstances of the transaction, and let this guide you in the amount of damages to be assessed.

The amount of exemplary damages the law leaves to the jury, not to be fixed arbitrarily, but by the deliberate and temperate exercise of common sense and sound judgment. You [73] are the sole judges of the credibility of the witnesses and the weight to be given to their testimony.

The court having thus mapped out the path of your duty, makes no doubt that you will pursue the investigations to which it conducts you, with freedom from passion or prejudice, and with a recognized and pronounced impartiality which will be alike creditable to you and honorable to the administration of justice.

Mr. Glover, for the Plaintiff.

Mr. Musser, for Montgomery.

Mr. Noble, for Fletcher, and the other Defendants.

[NOTE. — On the conclusion of the plaintiff's evidence the court instructed the jury that there was no evidence whatever, proper for them to consider to connect the defendant, Fletcher, with the trespasses sued for, and the jury as to him, returned a verdict of not guilty. The other defendants submitted evidence to the jury, and they returned a verdict of guilty against the defendant, Montgomery, giving only actual damages, and of not guilty as to the others.]

SWEENEY v. COFFIN.

REMOVAL OF SUITS—PRACTICE.—Under the provisions of the Judiciary Act of 1789, where application is made to remove a cause from the State court to the United States circuit court on account of the citizenship of the parties, it is *not necessary* that the petition filed for that purpose should be *verified by affidavit*. The filing of the petition for removal is a sufficient *appearance* to the suit to give the court jurisdiction of the person; and the question as to citizenship of the parties can be raised in the United States court. If the party fail to file a petition for removal at the *time of entering his appearance*, he will be precluded from doing so at any subsequent stage of the proceedings.

Id.—Under the *subsequent Acts* of 1833, March 8, 1863, July 29, 1866, March 2, 1867, the *petitions* for removal must be *verified by affidavit*. (Per TREAT J., *arguendo*.)

[74] Before TREAT J., and KREKEL, J.

The facts appear in the opinion.

TREAT, *District Judge*.—This is a suit originally brought in the *State* circuit court for Butler County, returnable at the March term thereof.

At the return term, the defendant, by attorney, filed a petition for the removal of the cause to the United States circuit court, on the ground that the amount in dispute exceeded five hundred dollars, and that the defendant is a citizen of Pennsylvania, and the plaintiff a citizen of Missouri. The necessary bond was given, but objection was made by plaintiff's attorney to the desired removal, on the ground of insufficient affidavit, etc. This objection was overruled by the State court, and a bill of exceptions filed.

The pending motion is to remand said cause to said State court, on the ground that the same was improvidently removed here. The ground of the motion is not specific, and the court has examined the transcript to ascertain if any irregularity exists. The objection presented to the State court was that the affidavit to the petition was sworn to by an attorney, and not by the defendant himself, and that it failed to allege that defendant could not have a fair trial.

The Act of September 24, 1789, section 12 (1 U. S. Stats. 79), does not require any affidavit to the petition. True, Conkling in his treatise refers to a notice of the application and to an affidavit, a practice which may be advisable, and which may

obtain in some circuits; but the statute of 1789 has no such requirements. That statute says, "the defendant shall, at the time of entering his appearance at such State court, file a petition for the removal," etc., and offer good and sufficient surety, etc., whereupon it shall be the duty of the State court to accept the surety and proceed no further in the cause, etc.

[75] In several adjudications the question has arisen, how the amount of the matter in dispute is to be determined, as the statute says if the same "shall appear to the satisfaction of the court to exceed five hundred dollars, exclusive of costs." That question may be considered authoritatively settled, viz., it is the amount claimed in the declaration.

The court can find no authority in that statute, nor in published decisions based thereon, requiring the petition for removal to be sworn to, although such seems to have been the general practice.

In the case under consideration, there was in the State court no formal "appearance," as such, entered. When the Act of 1789 was passed, the first formal step in a cause, so far as the defendant was concerned, was his appearance. That appearance may have been voluntary, or by entry after service of a *capias* where bail was required, etc., but still a formal entry of his appearance was made of record. Such practice has, to a large extent, disappeared throughout the United States, because service on a defendant to appear is held to answer all the requirements of an actual appearance, so as to conclude him by the subsequent proceedings. In personal actions not criminal, as a general rule, he could appear by attorney; and as a matter of fact, as well as of law, he was considered as present, through his attorney. Hence, if in 1789, a party to a suit could appear by attorney in civil causes like the present, for the purpose of pleading, etc., why not for the formal entry of appearance to the original complaint?

But in this case there was no such formal entry by or through any one; but the first step on the part of the defendant was the filing of the petition, by his attorney, for the removal of the cause to this court. Is the appearance of a defendant petitioning for a removal an entry of his appearance in the State court, within the meaning of the Act of 1789? Although no express

decision in a United States court has been found, and although State courts differ largely as to what makes an appearance in causes before them, and whether appearances ^[76] by attorneys are conclusive or *prima facie* merely; yet there are general reasons governing the removal of causes from State to United States courts, which enables this court to reach a satisfactory conclusion on the point presented.

When the jurisdiction of a United States court is dependent on the *citizenship* of the parties under the constitution and acts of Congress, if the suit be originally brought in the United States court, personal service is necessary unless there is a voluntary appearance. (*Toland v. Sprague*, 12 Peters, 300.) If this suit had been brought originally in this court against the defendant, service or appearance would have been necessary for further proceedings. Although in State courts constructive service is sufficient, it is not so in a United States court, and hence the necessity of a voluntary appearance or of actual service. But as appearance by attorney was and is admissible in this class of actions, where no *capias* or bail is required, this court holds that the filing of the petition for removal is the entry of an appearance within the meaning of the statute. Indirectly, the reasons for such a rule were given by the supreme court, not only in *Toland v. Sprague*, *supra*, but also in several other cases. By constructive service in the State court it could have proceeded to judgment; but to prevent such action defendant availed himself of his right of removal, and is precluded from denying the status he has assumed. If the defendant denies that status, he can raise the jurisdictional question in the United States court. The defendant is therefore held to have appeared in the State court and to be bound by his action there.

There seems to be some confusion about removals from State courts to United States courts, arising under the several recent statutes. By the Act of 1789, inasmuch as both State and United States courts have concurrent jurisdiction in many cases, the defendant had his right of election by conforming to its provisions. If he appeared in the State court and pleaded, he was held to the jurisdiction to which he had submitted. ^[77] He made an issue there, for that tribunal to dispose of—an issue on the merits in a court of general jurisdiction. Hence, by that

act he must file his petition for removal *at the time of entry of his appearance and before plea put in*. That is the first time at which he could make known his election of the tribunal to pass upon his rights.

By the Act of 1833, generally known as the Force Bill, and by the Act of March 3, 1863 (12 U. S. Stats. 756, § 6), also by the various subsequent acts to be found in 14 U. S. Stats. 172, 306, 558; 15 U. S. Stats. 227, 267, the right of removal in cases where officers of the United States are concerned, or where acts are done under authority or color of authority of the United States, is fully provided for and regulated. But none of those acts affect the case under consideration. The Act of 1863 requires in the cases for which it provides, an *affidavit* to the petition for removal, said petition to be filed at the time of entering appearance, and it allows *appeals* after final judgment from a State court to a United States circuit court. That act, however, is confined to the class of cases it enumerates. Similar remarks apply to several of the other acts of Congress cited. In some, special modes of proceeding are required, such as petitions, affidavits, certificates of counsel, bonds, etc., and are mostly in reference to United States officers, or those acting under the laws of the United States, when their action in respect to such official proceedings, or by supposed authority of the United States, is called in question. So there are statutes in reference to the rights and duties of common carriers where interrupted by military or rebel violence. Those, however, are peculiar to the cases there enumerated, and make no special provisions therefor.

Private parties, not affected by official action or United States laws, were required by the Act of 1789, to petition for removal when they *first* appeared in a State court, or they were held to have waived their right of election to trial elsewhere. The exception to that rule is made, first, by Act of July 27, 1866 (14 U. S. Stats. 306). Where all the parties, plaintiff ^[78] or defendant, are not of the same State, certain privileges are granted to them, thus obviating the difficulties arising from decisions of the United States supreme court on that point under the Act of 1789. Second, by the Act of March 2, 1867 (14 U. S. Stats. 558), in which the citizen of another State than

that in which suit is brought may, if the other party be a citizen of the State, file an *affidavit*, whether he be plaintiff or defendant, stating that he has reason to, and does, believe that, from prejudice or local influence, he will not be able to obtain justice in such State court," and then on his petition for removal may have the same removed, "at any time before the final hearing or trial of the suit," by giving good and sufficient surety, etc.

The distinctions are clear and important. If their cause of removal is based merely on citizenship of the parties, the application must be made at the time of appearance in the State court, by the defendant, and no affidavit is required. If the objection be prejudice or local influence, endangering a fair trial, the application may be made by either plaintiff or defendant, at any time before final hearing or trial, but must be supported by affidavit.

The Act of July 27, 1868, relates to corporations *organized under the laws of the United States*, permitting them to file a petition for removal, verified by oath, "either before or after issue joined."

The foregoing reference to the various acts of Congress is sufficient to indicate that as this case occurs solely under the Act of 1789, the defendant was required at the time of first appearing in the State court only to file his petition for removal, alleging his citizenship (as he did), and averring the amount in controversy to exceed five hundred dollars, exclusive of costs. No oath was required, nor *technical* entry of appearance, for his appearance by said petition was sufficient under the statute.

If he had appeared *after* pleading, the petition and *affidavit* [79] would have had to show prejudice or adverse local influence endangering a fair trial.

KREKEL, J., concurs.

Motion overruled.

[NOTE.—Construction of Acts July 27, 1866, and March 2, 1867. See *post*, *Sands v. Smith*.]

Verification of Petition for Removal of Cause not Necessary.—Cited, *Allen v. Ryerson*, 2 Dill. 503.

HAZLETT ET AL., LIBELANTS, v. CONRAD, RESPONDENT.

ADMIRALTY—COLLISION—DAMAGES.—In a case of collision between an ascending and descending steamer on the Ohio River, both were held to be in fault, and the damage divided according to the rule in admiralty.

ID.—SIGNAL LIGHTS—LOOKOUTS.—The respondent's vessel was adjudged to be in fault because cut of her proper place in the river when the collision occurred, and because she had no licensed pilot and no proper lookout; and the libelants' vessel was found to be in fault because her signal lights were not in proper places, and because she had no lookout as required by law, and her master was not at his post, but away from it without cause.

ID.—The testimony relating to the foregoing facts stated and effect considered by KREKEL, J.

ID.—Signal lights hung on each side of the boat on nails driven into the nosing of the hurricane roof are not in their proper place, since the derricks and spars would necessarily obstruct the view of them in certain directions.

ID.—The pilot-house in the night time, especially when it is very dark, and the view obstructed, is not the proper place for the lookouts to be stationed.

ID.—Masters of vessels are not proper lookouts.

ID.—A commander of a steamer who, after hearing the whistle of an approaching vessel, goes below on deck to look after freight without any justifying reason, *held* to be in fault where a collision occurs before his return to his post.

Before DILLON, J., and KREKEL, J.

APPEAL from a decree in admiralty of the district court for the eastern district of Missouri, pronounced by TREAT, J.

The case was one of collision between an ascending and descending steamer on the Ohio River. Respondent appeals [80] from the decree, which found both steamers to be in fault, and divided the damages, and insists that the libelants' boat was solely to blame.

Sharp & Broadhead, for the Libelants.

Rankin & Hayden, for the Respondent.

KREKEL, District Judge.—Libelants, owners of the steamer *Katie* bring this action against respondent, owner of the steamer *Des Moines*, to recover damages growing out of a collision which occurred on the 22d day of November, 1864, in the Ohio River, in the chute between Diamond Island and the Indiana shore, by which the *Katie* was sunk and became a total loss. The libel charges the fault of the collision on the *Des Moines*. The answer of respondent denies that the *Des Moines* was in

fault, and charges the fault on the *Katie*, in this, that she had no signal lights, did not answer signals, that she was not in her proper place in the river, and that she made no effort to avoid collision. Damages done to the *Des Moines* by the collision are claimed by respondent. The court below found both steamers in fault, referred the case to commissioners to ascertain and report the damage caused to each vessel by the collision, divided the amount ascertained between them, and rendered a decree accordingly. From this decree of the district court respondent appeals.

A preliminary question as to plaintiffs' right to sue has been raised on the hearing, and on looking into the record the court finds that libelants have made out a *prima facie* case of ownership, one at least which, unrebutted, entitles them to maintain this action.

Passing to the merits of the case it is found that on the night of the day mentioned, the *Katie* was on a voyage on the Ohio River from Evansville to Nashville, and met the *Des Moines* on her way from Nashville to Louisville, loaded with troops. It was a starlight night, and objects could be seen a half mile at least. The pilot of the *Des Moines* testifies ^[81] that, running up the Indiana shore, and within forty or fifty yards of it, he discovered something in the river above him which he could not make out, but he sounded his whistle for the larboard or Indiana side, received no answer, stopped his engines in due time and backed them when danger of a collision became imminent. About the time the headway of the *Des Moines* had run out, and while backing, the collision took place, and the *Katie* received the injury causing her total loss.

For the *Katie* it is testified that the *Des Moines* was seen a half mile off, or more, coming up the Indiana shore, that the *Des Moines* blew her whistle for the larboard or Indiana shore, that the signals were promptly answered by the *Katie* for the larboard or Kentucky shore.

The witnesses for the *Des Moines* testify that they did not see signal lights on the *Katie*, nor hear any answer to signals of the *Des Moines*. The witnesses for the *Katie* testify that her lights were up, fastened to the nosing of the hurricane roof on each side, and that an officer of the *Des Moines* took one of them

down *after the collision*. The captain of each steamer seems to have been on watch without any other lookout.

The witnesses for the libelants all testify that the collision took place about two hundred to three hundred yards from the Indiana shore, and near the middle of the chute. It is manifest that no collision could have taken place if the *Des Moines* had been within forty or fifty yards of the Indiana shore and the *Katie* from two hundred to three hundred yards out in the river, as the witnesses testify. An examination of the wounds given and received will, however, help to solve the problem, and lead to conclusions justifying the decree.

The *Katie* received her injury on her starboard, near the gangway; the *Des Moines* hers near the bow or stem, and towards the larboard.

In order thus to give and receive the injury one or the other [82] of the boats must have been quartering to the current. The *Des Moines* according to the testimony is found running within forty or fifty yards of the Indiana shore, and a boat to strike her on the stem and the larboard must have been still nearer the shore. To place the *Katie* in such a position and quartering the river would have put her stern against the bank, a position which none of the witnesses assign her. Again, it is testified that at the time of the collision the *Des Moines'* headway had run out, and she was backing her wheels, and that the blow swung her round quartering to the current. If the position of the *Des Moines* had been forty or fifty yards from shore she would inevitably have struck the bank—a matter to which no one testifies. The *Des Moines* received her injury at the stem and to the larboard, which would be the case if she ran into the *Katie* as testified to by the witnesses for the *Katie*. It is certain that the collision did not take place near the Indiana shore as testified to by the witnesses of respondent, but it is highly probable, if not certain, that it took place one hundred and fifty to two hundred yards from the shore.

This being the case the *Des Moines* was not in her proper place in the river, the channel, according to the testimony, being along the Indiana shore, for which she, as the ascending boat, had signaled. The *Des Moines*, not being in her proper place in the river, and failing to justify her position where found,

must be held in fault. She was also in fault in not having a licensed pilot.

It seems that the *Des Moines* was in the employment of the government, and running from Cairo to Nashville. Shortly before the collision she was at Nashville, and was there ordered by the quartermaster to take troops to Louisville. Her pilots were licensed to run between Cairo and Nashville, and when she arrived at Smithland, at the mouth of the Cumberland, an unsuccessful effort was made to obtain pilots to Louisville, and she proceeded, with a pilot not licensed for that part of the Ohio River, to Louisville.

[83] The nature of the employment of the *Des Moines* does not clearly appear. The evidence leaves it in doubt whether the government had the entire control of the vessel, or whether it merely directed the use of her with the consent of the owner who was her master, and on board as such. The question of compulsion is, therefore, not before the court.

The *Des Moines* was also in fault in not having a proper lookout, of which more is said hereafter when speaking of the faults of the *Katie*.

But the *Katie* was also in fault. Her signal lights were hung on each side on nails driven into the nosing of the hurricane roof. This was an improper place for carrying signal lights, for the derricks and spars would necessarily obstruct the view of them in certain directions. When the *Katie* was built she had a crane attached to her chimney to carry signal lights, but one of the horns of the crane being broken, she afterwards carried her lights as stated. The rules of navigation require signal lights to be so arranged as to show a uniform and unbroken light.

The *Katie* was also in fault in not having a lookout stationed in proper place. In *The Ottawa*, 3 Wall. 268, the supreme court of the United States says that "steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of that duty. Proper lookouts are competent persons, other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot

house, in the night time, especially when it is very dark, and the view is obstructed, is not the proper place. In general, elevated positions, such as on hurricane deck, are not as favorable situations as those more usually selected on the forward part of the vessel, nearer the stem." (*The Ottawa*, 3 Wall. 273, per Clifford, J.)

In the first place, the masters of both vessels acted as lookouts while in charge of and navigating their vessels. They ^[84] were not proper lookouts, nor were they stationed in the proper place for lookouts. No other lookouts appear to have been on either steamer. Besides this the master of the *Katie* says that when he heard the whistle of the steamer he stepped out of the cabin, heard the answering signals of the *Katie*, and, seeing the approaching steamer a good way off, he went to look after some cattle on board as freight, and before he got back the steamers had collided. Thus the *Katie* was left without a commander or lookout at the very time when they were both, as events showed, sadly needed.

The *Katie*, for want of a proper lookout, and for the conduct of her officers, must be held in fault.

It is charged that the *Katie* was also in fault in making no effort to avoid a collision when the danger had become imminent. It is very difficult to say what should have been the action of the *Katie* under the circumstances. The *Des Moines* seems, either for the purpose of crossing over to the Kentucky shore or on account of unskillful navigation, to have suddenly come into the course of the *Katie*. It may have been a question difficult to determine by those navigating her, whether to go ahead, or to back her, was the best means of escape from danger. This in all probability being the case with those handling the boat, the court will not undertake, from the evidence, to approve or condemn the action taken.

In the sense of the law, under the term "faults," for which a party is held responsible, is included, not only willful misconduct, but the neglect of any proper precaution to avoid collision, and want of care, vigilance, or skill in the management of a vessel. Proceeding under this definition, and the facts of the case, the court finds that the *Des Moines*, by being out of her proper place in the river when the collision occurred, and fail-

ing to account for her position, must be found in fault. (5 How. 441, 465.) She had no licensed pilot navigating her at the time of the collision, and is therefore in fault. (See Act of Congress of August 30, 1852, and rules ^[85] and regulations.) She had no lookout as required, and is therefore in fault. (*The Ottawa*, 3 Wall. 268.)

The *Katie* was also in fault. She did not have her signal lights in proper position, and was therefore in fault. She had no lookout, as is required, and in this respect was in fault. Her master was not in his proper place, but, on the contrary, was in a very improper place at the time of the collision, and she was on that account in fault.

Both vessels being in fault, the court below properly had the damages done to both ascertained, and under the rule of law divided the damages between them. There is nothing in the objections raised to commissioner's report as to the finding of damages done, and the objections are overruled.

The decree of the district court is in all respects affirmed, and a decree will be entered accordingly.

DILLON, C. J., concurred.

Decree affirmed.

[NOTE.—In the case of *Fredericks*, libellant, v. *The Steamboat McPorter*, on appeal from the eastern district of Missouri, at the April term, 1871, before DILLON, J., and KREKEL, J., in which Messrs. Rankin & Hayden were proctors for the libellant, and Mr. Moreau for the claimant, it was decided, affirming the decree of TREAT, J., that where a barge was seaworthy, and properly moored, a steamer having a tow being free to move, was responsible for damages caused by collision with the barge. The question whether, when a vessel is properly landed and moored, her unseaworthiness would, in any case, be a defense for damages caused to her by other vessels engaged in navigation, was discussed by KREKEL, J., who delivered the opinion, but not decided by the court.]

MARTIN, ASSIGNEE, ETC., v. SMITH ET AL.

STATE STATUTES OF LIMITATION—EFFECT IN FEDERAL COURTS.—Unless Congress has otherwise provided, State Statutes of Limitation are applied to controversies in the courts of the United States.

FRAUD—LIMITATION IN EQUITY.—The fraud which in equity will prevent the running of the Statute of Limitations is that which is secret or concealed, as distinguished from [86] that which is open, visible, or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action.

Id.—Even in cases of fraud, the statute will in equity begin to run as against the plaintiff when he has knowledge or information of facts which reasonably creates the belief that the transfer is fraudulent, and can be proved to be so; and if, under all the circumstances, the plaintiff has been guilty of negligence in discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced.

Id.—DISCOVERY.—What, in the view of a court of equity, will be regarded as *discovery* of the fraud considered.

Id.—The statute of Missouri, which provides that “actions for relief on the ground of fraud, must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud,” construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation.

LIMITATIONS—BANKRUPTCY—FRAUDULENT DEBTOR.—In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was *continuous*, and the debtor remained down to the time suit was brought, the real owner of the property sought to be recovered, and in possession of it, *held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before the suit was commenced.

Before DILLON J., and KREKEL, J.

THIS was a bill in equity filed originally in the district court by Martin, as assignee in bankruptcy of Edward K. Woodward, to recover certain property from the defendants.

Prior to February, 1861, Woodward had been a merchant in St. Louis, doing business in his own name and in the usual way. In the fall of 1860, however, he became much embarrassed, and, in fact, insolvent. He endeavored, late in 1860, first through the defendant, Gray, and subsequently through the defendant, Smith, to effect a compromise with his eastern creditors, but could not succeed. The defendant, Smith, is a brother-in-law of Woodward, is by profession an attorney at law, and resides in Hartford, Connecticut.

On the 8th of December, 1860, Woodward, at St. Louis, wrote [87] to Smith, at Hartford, informing him that suits were already begun against him, entreating him to go to New York and Philadelphia to see if he could not effect the desired compromise and extension. Woodward’s letter then continues: “Make the best arrangement possible, except cash down or security; if you cannot arrange with them, come right on here and buy me out on terms that you will be safe in, and such as they will be forced to accept. One suit is within the justice’s jurisdiction, and judgment will be rendered on the 10th, so I want something done

previous to that time. The trial of the other two is set for the 17th. I shall call for a witness who, I don't believe, will be got at the time, and the probability is that they will be continued for the present. My real estate is in a precarious condition, and unless you can get those creditors into the arrangement, so as to give me time to protect it, everything will be swallowed up, unless you can come out, etc. . . . I shall be anxious to hear from you."

Smith failed to make any compromise, but he effected a purchase of certain claims against Woodward, at twenty-five cents on the dollar; went to St. Louis February, 1861, and on the 5th of that month purchased of Woodward his stock of merchandise, for the expressed consideration of \$11,360.

This sum was paid by turning over to Woodward, at their face value, the claims which Smith had purchased a few days before at one fourth that sum; by assuming amounts due for the rent of the store building, and by his three notes to Woodward for \$919.64 each.

These notes were soon afterwards paid to Woodward in claims which Smith purchased of Woodward's creditors at twenty-five cents on the dollar, and then sent to St. Louis and turned over to Woodward at their par or nominal value, and the notes for rent were paid out of proceeds of goods sold from the store.

After the sale of the goods to Smith, the store was operated in the name of Bailey, agent, for over a year; then in ⁽²⁸⁾ the name of Bell, agent, until March, 1864, when a limited partnership was formed under the statute of Missouri, the articles being executed by the defendants, Gray and Smith, the former being the general, and the latter the special, partner. This limited partnership was, by its terms, to continue for three years from March 1, 1864, and the business was to be conducted in the name of Gray. When the three years expired the same arrangement was continued, and the store was being thus conducted in December, 1867, when Woodward was, on his own petition, adjudicated a bankrupt, and in July, 1868, when the present suit was commenced.

On the 22d April, 1861, Woodward, without beforehand consulting Smith, made to him, subject to certain encumbrances, a deed of all his real estate, and this deed was placed on record

in February, 1862. Among other parcels was the house in which Woodward then lived, and where he has ever since resided, without paying rent therefor, and the taxes on which have been paid by Woodward out of money from the store. Certain parcels were redeemed by Woodward's direction from judicial sales, by money likewise taken from the store, and titles made in the name of Smith, of which he was subsequently advised. From the store also, and under Woodward's management, encumbrances have been paid off and the claims have been assigned to Smith, who holds them against the property. (See *Robb v. Woodward*, Supreme Court Missouri, March term, 1870.)

Soon after the purchase of the goods Smith returned to Connecticut, leaving the store in the nominal possession of one Bailey, as his agent, and taking with him of moneys in the store, the sum of thirty-seven dollars to pay his expenses. In the professed capacity of clerk for Smith, Woodward remained in the store from the time of his sale to Smith, in February, 1861, down to the time of the filing of the present bill, and the evidence showed that, in fact, he managed there as before, and that Bailey and Bell, and even Gray, acted under his direction.

[§9] The bill made Smith, Woodward, and Gray defendants, and set out at great length all of the above-mentioned facts, with many others, and charged a fraudulent combination throughout all these transactions between Smith and Woodward, to defraud the creditors of the latter; that the sale of the goods was colorable and fraudulent; that in reality Woodward was the real owner during all the time the business was conducted in the name of "Bailey, agent," and in the name of "Bell, agent," and in the name of Gray; that the real partner of Gray is Woodward, and not Smith; that Smith has been refunded out of the sales from the store all moneys which he has expended in the purchase of claims against Woodward, or for advances to purchase goods.

The bill also alleged that Woodward, in pursuance of the original fraudulent design, procured to be effected the limited partnership with Gray, who was to contribute six thousand dollars in cash against the stock, which was put at twelve thousand dollars, and Gray was to be interested in one third of the

profits, and Woodward in two thirds, but to carry out the fraud Smith's name was used in the articles, and not Woodward's. The bill stated that large profits had been made; that the stock increased in value; that Woodward, at the date of his bankruptcy, was entitled to a large sum from the firm; that Gray had withdrawn large sums and amounts, and was indebted to his co-partner, Woodward, therefor; that defendants Smith and Gray had a large amount of property belonging to the firm, which they had sold since the bankruptcy of Woodward was declared.

The bill also stated that the assignee, after his appointment in January, 1868, first discovered the frauds aforesaid; that claims to the amount of about thirteen thousand dollars had been established against the estate of Woodward, by various creditors named, none of whom, it was averred, knew of the frauds complained of, until January 3, 1867.

It was also averred that Smith & Gray denied that Woodward had any interest in the firm, and it was stated that the [90] latter had falsely returned to the bankrupt court that he had no interest therein.

The prayer of the bill was that an account be taken of all the said partnership dealings between the defendants; that what should be found due from Smith & Gray to the firm be decreed to be paid to the complainant as assignee; that the respective rights of the defendants in the firm property, at the date of Woodward's bankruptcy, be determined; that a receiver be appointed to collect the debts and take charge of the property of the partnership; that the property be sold and converted into money, and for general relief.

The defendants severally answered, denying the frauds charged against them, and also denying that Woodward ever had any interest in the limited partnership mentioned. Smith, in his answer, specially pleaded the Statute of Limitations of the State of Missouri, alleging that the purchase of the goods, charged in the bill to be fraudulent, was made February 5, 1861, and that no suit to set aside said sale as fraudulent as to the creditors was brought by or for them within five years after the sale was made and possession taken, wherefore the creditors and the assignee are barred of such suit by the statute of November 22,

1855, referred to in the opinion of the court. Replications were filed; a large amount of testimony was taken, and on final hearing the bill was dismissed by the district court, whereupon the assignee appealed to this court.

Lee & Webster, and Cline, Jameson & Day, for the Assignee.

Whittlesey & Hamilton, for the Defendant.

DILLON, *Circuit Judge*.—In the argument at the bar the counsel differed, not indeed respecting the general nature of the bill, but upon the point whether in the relief sought it embraced the real estate conveyed by the bankrupt to the respondent, Smith, as well as to the personal property or the interest in the co-partnership therein mentioned.

[91] The point is important, for the limitation as to real actions is ten years, and as to personal actions five years. The present bill was exhibited more than five years, but within ten years after the sale of the goods and the conveyance of the real property.

If the averments of the bill and the prayer for relief be carefully examined, it is plain, beyond controversy, that all that is alleged respecting the real estate is in the nature of inducement to show the character of the dealings between Woodward and Smith, and to make probable the *gravamen* of complaint.

It is extremely important that we shall obtain a correct notion of the real nature, scope, and purpose of the bill; for upon the view we take of this will depend, as we shall presently see, the question whether the Statute of Limitations bars the relief sought.

The bill is not one to set aside as fraudulent the sale of the specific stock of goods made in February, 1861, or to recover their value as property to which the creditors of the bankrupt are entitled. This sale is indeed set out in the bill, and is alleged therein to have been fraudulent, but it is set forth only as inducement, as the initial transaction of a fraudulent conspiracy and scheme which ended, not with the consummation of the particular sale, but which continued in existence and was flagrant down to the period when Woodward was adjudicated a bankrupt, and when this suit was commenced.

The plea of the statute sets out this sale made in February, 1861, and then alleges that the suit is barred by reason of the lapse of more than five years before it was commenced. The plea misconceives the nature and purpose of the bill, and proceeds upon the mistaken notion that it is brought simply to impeach the sale of the original stock of goods made more than seven years before.

The true view of the bill is, that it charges that the real parties in interest in the business of the limited partnership carried on in the name of the defendant Gray, are Woodward ^[92] and Gray, and not Smith and Gray, as appears on the face of the written and recorded articles, and is given out by all three of them to the creditors and the world, and consequently that the interest of Woodward in this business and in the assets of the firm belongs to the assignee for the benefit of the creditors, and it is this interest which the assignee by the present suit is seeking to recover.

The suit is a personal, as distinguished from a real action, and hence the ordinary limitation period is five years, and not ten, from the time when the cause of action accrued. (*Robb v. Woodward*, Supreme Court, Mo., March term, 1870.)

In the case just cited the supreme court of Missouri decided, upon the proof before it, that the conveyance of the real estate by Woodward to Smith was fraudulent, and of the correctness of that judgment on this point there can be no question. That case had no relation to the personal property or partnership interests now in controversy, and there was no question as to when the fraud was discovered, and hence what is said in the opinion on these subjects by way of argument by the learned judge who delivered it, is not to be taken as points decided by the court.

Upon the proofs in the record now before us we consider the fraudulent conspiracy between Woodward and Smith, charged in the bill, to be so clear as not to admit of fair debate, and that so far from ending with the purchase of the goods in 1861, it continued down to the time this bill was brought. The evidence is voluminous, and it would require too much time, without any resulting benefits, to enter upon a detailed or analytical statement and discussion of it.

Suffice it to say, that it firmly establishes that Woodward designed to place the property beyond the reach of his creditors; that Smith made a colorable purchase of the goods to enable the debtor to effect his purpose; that apparently he has received from the sale of the goods in the store all sums which he expended in buying claims against Smith or otherwise; that Woodward was all the time the real, while Smith ^[98] was only the nominal, party in interest. That the purchase of the stock of goods by Smith was fraudulent is very faintly, if at all, denied by counsel. At all events, they have placed the stress of their defense upon the Statute of Limitations, and it was upon this ground, undoubtedly, that the bill was dismissed by the learned judge whose decree we are called upon to review.

The question involved is alike interesting and important. To determine it, we must first look at the statute to ascertain its meaning and purpose, and then at the special character of the case in hand, and see whether it is one where the statute will operate to bar the relief sought. In a suit of this kind the assignee is clothed with all the rights of creditors (whom, indeed, he represents) to impeach transfers of property made by their debtor or colorably held by others in fraud of their rights. (*Allen v. Massey, ante*, 40, 44.)

The Code of Missouri declares that "there shall be but one action in the State for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action." (2 Wagner's Stats. 991, § 1.)

The Statute of Limitations, section 8, enacts that "civil actions other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"Section 10, within five years; fifth, an action for relief on the ground of fraud — the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." (2 Wagner's Stats. 918.)

Unless Congress has otherwise provided, State Statutes of Limitations are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the State.

It is necessary, therefore, to construe the tenth section of the Statute of Limitation above quoted, in order to determine ^[94] its effect upon the rights of the parties to present suit.

We have had called to our attention no decision of the highest court of the State construing this statute in respect to the *precise* questions which we are now to decide. The legitimate office of construction is to ascertain the legislative will or purpose; and to this end it is not only proper, but often necessary to look not simply at the language of the particular enactment under consideration, but also at the subject-matter of it, in the light which the former law, or general principles shed upon it.

Formerly, in the State of Missouri, the forms of action and modes of procedure were as at common law, with a distinct equity jurisdiction. At that time the Statutes of Limitations were, in substance, the same as 21 Jac. 1, c. 16, and professed to apply only to certain specified actions at law. (Rev. Stats. 1846, pp. 373, 374.)

Equity at this time applied, of course, these statutes according to the settled doctrines of that court.

The Code subsequently enacted provided, as we have seen, that there should be but "one form of action"—"a civil action"; and the legislature made the Statute of Limitations apply to all civil actions; which statute would probably be held, in this State, as it has been in others under legislation of a similar character, to embrace equitable as well as legal causes of action so far as they fall within the terms of the act. That is, the limitations as to all actions therein mentioned and provided for applies equally to causes of action formerly cognizable either in equity or at law. (*Newman v. De Lorimer*, 19 Iowa, 244; *Johnson v. Hopkins*, 19 Iowa, 49; *McNair v. Lott*, 25 Mo. 182.)

In this view it is easy to perceive why the legislature adopted the tenth section of the act concerning the limitation in cases of fraud. If the provision had been *merely* that "actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued," it is extremely ^[95] probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated, and not as under the well-known equity rule, from the period when the fraud was or should have been dis-

covered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the legislature added the words: "The cause of action in such case shall not be deemed to have accrued *until the discovery by the aggrieved party . . . of the facts constituting fraud.*"

In my judgment, the legislature by this provision, in substance, re-enacted the doctrine which had been established by courts of equity, as to the effect of fraud in preventing the running or operation of Statutes of Limitation.

If this be so, it becomes important to examine the nature and grounds of the equity doctrine, the better to understand the meaning of the statute.

Mr. Justice Story states the doctrine of equity thus: "If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." (Eq. Jurisp. § 1521.) "The question often arises in cases of fraud and mistake, . . . under what circumstances and at what time the bar of the statute begins to run." . . . "In cases of fraud and mistake, it will begin to run," he says, "from the time of the discovery of such fraud or mistake, and not before." (Eq. Jurisp. § 1521, *a.*)

This distinguished jurist, on the circuit, in the supreme court, and in the preparation of his commentaries, had frequent occasion thoroughly to explore the subject, and his opinions upon it are entitled to great consideration, though it is to be regretted that he does not go more into detail. In his commentaries, he does not discuss the nature of the fraud which in equity will prevent the bar of the statute from running; nor what, in the view of that court, will amount to a discovery of the fraud. An examination of these topics, as [26] well as of the ground and reason of the rule itself, is essential to a thorough understanding of the subject, and is required by the circumstances of the cause now before us for determination.

As to the kind of fraud contemplated: Some judges have said that the fraud which will avoid the effect of the Statute of Limitations must be positive and actual fraud. But this is a point which we are not now required to notice, for in this case the fraud was actual and positive.

It seems to me quite clear, both from an examination of the authorities and the nature of the case, that the fraud which shall operate to displace the statute or prevent its application is secret or concealed fraud, a fraud unknown to be such to the party injured thereby. In a leading case on the subject Lord Redesdale said: "That as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the Statute of Limitations shall not operate; because, until discovery, the title to avoid it does not completely arise, etc. Pending the concealment of the fraud, the statute ought not in conscience to run," etc. (*Hovendon v. Lord Annesly*, 2 Schoales & L. 624.)

That the fraud must be secret or concealed, not open, known, or visible, to prevent the bar of the statute from running, is distinctly asserted or assumed in many cases. (*Troup v. Smith*, 20 Johns. 33, 47, 48, per Spencer, C. J.; *Stearns v. Paige*, 7 How. 819, 829; *Carr v. Hilton*, 1 Curt. 230; S. C. 1 Curt. 399; *McLain v. Ferrell*, 1 Swan, 48; *Bucknor v. Calcote*, 28 Miss. 432; *Wilson v. Joy*, 32 Miss. 233; *Cook v. Lindsey*, 34 Miss. 451; *Young v. Cook*, 30 Miss. 320; *Campbell v. Vining*, 25 Ill. 525; *Farnum v. Brooks*, 9 Pick. 212; *Phalen v. Clark*, 19 Conn. 421; *Moore v. Greene*, 2 Curt. 202; affirmed, 19 How. 69, 72; Angell on Limit. c. 28; Sugden on Vend. 612, pl. 17.)

It is declared, indeed, that no case can be found where the statute has been avoided, at law or in equity, unless on the ground of fraudulent concealment on the defendant's part. (*Bishop v. Little*, 3 Greenl. 405.)

[97] This subject was discussed by a truly great judge in the case of *Carr v. Hilton*, above mentioned, which was a suit in equity, by an assignee in bankruptcy, to recover of the defendant lands fraudulently conveyed to him by the bankrupt. The defendant relied on the Statute of Limitations contained in the Bankrupt Act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, Curtis, J., says: "Statutes of Limitation do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, is a fraudulent con-

cealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point.

As to what amounts to a discovery within the meaning of the equity rule: This is regarded as so important that it must, with all necessary circumstances, be distinctly stated in the bill.

Grier, J., speaking of this point when delivering the opinion of the supreme court, says: "Especially must there be a distinct allegation as to the time when the fraud was discovered, and what the discovery is, so that the court may see whether, by the exercise of ordinary diligence, it might not have been before made." (*Carr v. Hilton*, 1 Curt. 390; *Fisher v. Boody*, 1 Curt. 206; *Moore v. Green*, 2 Curt. 202, 206; S. C. 19 How. 69.) And the bill, it has even been said, should negative laches in not making the discovery. (*Mayne v. Griswold*, 3 Sand. 463; *Field v. Wilson*, 6 Mon. B. 479.)

The question recurs, however, *What is discovery?* I answer, *notice of the fraud*; or, in the language of the Missouri statute, of "the facts constituting the fraud." What is notice? In answering this, Judge Curtis in *Carr v. Hilton*, 1 Curt. 390, 393, quotes and approves the following ^[98] doctrine laid down in *Kennedy v. Green*, 3 Mylne & K. 719, 721, 722: "It is a well-established principle that whatever is notice enough to excite attention and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The cases quite generally hold that the statute will run, and fraud will not avoid it, if the plaintiff, under all the circumstances, has been guilty of negligence in discovering or attacking it. (*Smith v. Talbot*, 18 Tex. 774; *McDonald v. McGuire*, 8 Tex. 361, 370; *Campbell v. Vining*, 25 Ill. 525; *Ferris v. Henderson*, 12 Pa. St. 49; *Johnson v. Johnson*, 5 Ala. (N. S.) 90; *Bucknor v. Calcote*, 28 Miss. 432; *Edmonds v. Goodwin*, 28 Geo. 38; *Lott v. De Graffenreid*, 10 Rich. Eq. 348; *Farnum v. Brooks*, 9 Pick. 212; *Way v. Cutting*, 20 N. H. 187; *Stearns v. Paige*, 7 How. 819, 829; *Edwards v. McGee*, 31 Miss. 143; Angell on Lim. § 183, and note; § 190; *Nudd v. Hamblin*, 8 Allen, 150, and cases cited.)

It is easy, it seems to me, to press this principle too far, and

I prefer the test or doctrine approved and applied by Judge Curtis, i. e., holding the plaintiff to know all that the information he is possessed of makes it his duty, as a reasonable man, ordinarily vigilant in protecting his own interests, to know or to learn.

The language of the statute is "discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud." This is the same, in my opinion, as if it read discovery of the fraud. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know "the facts" which make that transfer fraudulent.

In *Godbalt v. Lambert*, 8 Rich. Eq. 155, 164, where an alleged fraudulent deed was placed on record, and it was contended that creditors were bound to know its character, the chancellor very sensibly observed, "registry of a deed is ^[99] only implied notice of its contents, and not of any fraud that may be perpetrated in its execution." I cannot assent to the correctness of the remark in the case of *Lott v. De Graffenreid*, 10 Rich. Eq. 346, that the registry of a deed is sufficient notice to creditors, and the Statute of Limitations begins to run from that period, even though the deed be fraudulent.

There is one peculiarity of the Missouri statute which ought not to be passed without notice, and that is the clause which renders it necessary to make the discovery of the fraud within ten years. The language of the section was evidently copied from the New York Code, which is literally the same as the Missouri statute, except that in New York the words, "at any time within ten years" are omitted. (Howard's N. Y. Code, § 91.) The same words are omitted likewise from the Ohio Code, the Nebraska Code (Stats. 1857, p. 395), the Kansas Code (Stats. 1868, p. 633), the Minnesota Code (Stats. 1866, p. 451), and the Iowa Code (Rev. 1860, § 2741.) All these statutes enact that in actions for relief on the ground of fraud "the cause of action shall not be deemed to accrue until the discovery of the fraud," or of the "facts constituting the fraud." Words limiting the time when the discovery shall be made are, so far as I have observed, peculiar to the legislation of Missouri.

Lord Erskine in one case declared that "no length of time

can prevent the unkennelling of a fraud." (Forrester, 66.) Lord Northington said, with emphasis, in *Alden v. Gregory*, 2 Eden, 285, "never, while I sit here, will delay purge a fraud." These expressions of decisive indignation against fraud are natural enough indeed, but if taken literally they lay down a doctrine which, if fully carried out, would be at war with the peace and repose of society, on which rests the wise policy of all limitation statutes. Hence the provision very generally adopted in the legislation of the States that the statute will begin to run from the period when the fraud is discovered, and hence, also, the additional provision of the Missouri statute, which seems to require the discovery to be ^[100] made within ten years from the consummation of the fraud. The effect of this provision is not to declare that the plaintiff cannot for a period of ten years be guilty of laches, or that he may for full ten years shut his eyes to facts which it would otherwise be his duty to notice and act upon, but its effect, rather, is to require him, at his peril, to make the discovery within the prescribed period. I do not doubt that the provision is wise in conception, and will prove salutary in operation.

The reason or ground in this rule in equity is quite plain. Applying, as this rule does, only to cases of secret or concealed, as distinguished from known, fraud, as before explained, I have no doubt that Lord Redesdale gives the true reason for its adoption by equity, viz., that it is against conscience for a party to avail himself of the statute when by his own fraud he has prevented the other party from knowing or asserting his rights within the period prescribed by the Statutes of Limitation. (2 Schoales & L. 634; *Troup v. Smith*, 20 Johns. 33, 47, 48.)

This is entirely consistent with the exposition of the rationale of the doctrine of Baron Alderson in *Brookshank v. Smith*, 2 Young & C. 68: "In cases of fraud, courts of equity hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this, courts of equity differ from courts of the law, which are absolutely bound by the words of the statute." (*Imp. Gas etc. Co. v. London Gas Light Co.* 26 Eng. L. & Eq. 425.)

So in cases under the Missouri statute: the limitation begins

to run as against the plaintiff when he has knowledge of facts which would have impressed a reasonable man with the belief that the transaction was fraudulent, for from that time his laches begins, if his debt is mature.

Judge Curtis, in the case before cited, speaking of the ground of the rule that fraud voids the statute, says: "In my judgment the most reasonable and sensible ground is that, substantially, [101] the title to avoid it does not arise until the fraud is known." (1 Curt. 200.) This is adopting the view of Lord Talbot, *Cases t., Talbot*, 63, and it has also the sanction of eminent judges.

The title to avoid the fraudulent transaction does ordinarily arise as soon as the fraud is perpetrated (26 Eng. L. & Eq. 425; Marsh. J. J. 445; 33 Miss. 233; 20 Johns. 33, *supra*); but *substantially* it does not, because the fraud is not known, and hence the fraudulent wrong-doer is estopped, while the aggrieved party is kept ignorant of his rights, from setting up against him the bar of the statute.

But this assumes that the creditor's debt is one which is due, so that he is in law enabled effectively to assert his rights, and therefore properly chargeable with negligence if he fails, for the prescribed period, to do so.

There may be some question as to the scope of the language of the statute, "an action for relief on the ground of fraud"; but there is no doubt that a bill in equity by a creditor to set aside a fraudulent conveyance or transfer of property by his debtor is such an action. The cases before cited will show that this point has never been disputed.

Having thus seen that the present suit is one which falls within the aforementioned tenth section of the limitation act; that the fraud contemplated by that act is fraud which is secret or concealed, as distinguished from that which is open and known; and having also seen what, in the view of a court of equity, is regarded as a discovery of the fraud, so that thenceforth the laches of the plaintiff and the running of the statute alike begin; that the ten years limitation in the section is not to be construed as sanctioning negligence or the shutting of eyes to information of the fraud; and having also seen the reason, or policy and purpose of this legislation, we are now prepared to

apply the statute, as thus expounded, to the facts of the present cause. This, in view of the length of this opinion already, we must do briefly.

The facts constituting fraud in the transfer of property by [100] a debtor are in some cases concealed or secret, and in some visible or open. The fraud in the sale of the stock of goods to Smith, in February, 1861, in view of the relationship of the parties, of facts known to a great many creditors as to Woodward's condition, and Smith's knowledge of it, and the manner in which Woodward was still allowed to exercise control over the property, was such, in our judgment, that any creditor might, if ordinarily vigilant, have discovered it within five years from its sale.

If the present was a bill simply to have declared fraudulent the sale made in 1861, we should have to hold, taking all the circumstances together, that the fraud was not so concealed or secret but the creditors, using due diligence, might and should have discovered it, and if their debts were due, could and should have assailed it within the five years. Undoubtedly, it was this view of the case which was taken in the court below.

But, as we have before shown, such is not the case made by the bill, and such is not the relief sought. The question before the court is, whether, upon proofs, Woodward has any interest in the limited partnership carried on in the name of the respondent, Gray; whether Smith or Woodward is the party really owning the interest other than that owned by Gray.

Upon this subject we entertain a very decided conviction, and that is, that Smith has no real and substantial interest therein; has apparently no money invested in it beyond what he has received; that his pretence of ownership is purely sham, a device to keep at bay the creditors of Woodward; and that the latter, though held out simply to be a clerk, is the owner of the interest in the firm, other than that held by Gray. Since 1861, Woodward has, in effect, been managing the store the same as before, giving to it his time, attention, and skill; to these, and the profits which are their product, his creditors and not Smith, are best entitled.

Equity looks at substance and not form. It penetrates [100] beyond externals to the substance of things; and it accounts

as nothing, and delights to brush away barricades of written articles and formal documents when satisfied that they have been devised to conceal or protect fraud.

The fraud in the case before us, as we view it, ended not with the purchase of the goods in 1861, but continued down to the time this bill was filed. The case is different from what it would be if the sale of the goods had been the only transaction, and Smith had taken exclusive possession of them and held or sold them as his own more than five years before his purchase was attacked by creditors of his vendor.

It is our opinion that the fraud, commenced in 1861, has been continued down to the time this suit was brought; that in equity, as respects creditors, the interest in the firm and its business is owned by Woodward and not by Smith; that the latter holds that interest, whatever it may be, in secret trust for the former, and hence the Statute of Limitations cannot avail to prevent that interest from being ascertained and subjected to claims of creditors of the bankrupt.

It is not necessary in this view to consider the point made that at all events the statute could not bar the relief sought, at least not entirely, because the debts of some of the creditors of Woodward did not fall due until 1867.

We now decide two points only: First, that Woodward has an interest in the property and assets of the firm business carried on in the name of Gray, which may be reached by the assignee in the present suit. Second, that the Statute of Limitation, pleaded by the respondent, Smith, is no bar to the relief sought.

The decree of the district court is reversed. .

KREKEL, J., concurred.

Rever

Note. Discovery of Fraud Within Meaning of Statute of Limitations.— Affirmed, *Wood v. Carpenter*, 101 U. S. 141. Followed, *Davis v. Anderson*, 6 Bank. Reg. 157. Cited, *Andrews v. Dole*, 11 Bank. Reg. 358, 366; *Baldwin v. Raplee*, 4 Ben. 447; *O'Brien v. Brown*, *post*, 589; *Darling v. Berry*, 13 Fed. Rep. 659.

Property Fraudulently Conveyed Vests in Assignee in Bankruptcy.— Followed, *In re Rainsford*, 5 Bank. Reg. 389.

[104] ABBOTT L. HODGE, AND AMELIA S. HODGE,
IN HER OWN RIGHT AND AS ADM'X OF NEHEMIAH
HODGE, v. NORTH MISSOURI RAILROAD.

SAME v. IRON MOUNTAIN RAILROAD.

PARTIES—MISJOINDER—EQUITY PRACTICE.—If one who has no interest in the subject-matter of the suit, or in the relief prayed, be joined as party plaintiff, the defect may be reached by a general demurrer for want of equity.

ID.—The next of kin of a patentee cannot be united as parties plaintiff with the personal representative, in a bill to enjoin the infringement of the rights secured by the patent, and for an accounting.

PATENT—TITLE IN PERSONAL REPRESENTATIVES OF DECEDENT.—Upon the death of the inventor, the title to the patent issued passes to the personal representative at the domicile of the patentee, who may sue for an infringement in any of the courts of the United States having jurisdiction. It is not necessary that letters should be taken out in the State in which the suit is brought.

Before TREAT, J., and KREKEL, J.

THESE were bills to restrain the infringement of a patent granted to Nehemiah Hodge, for a railroad brake, and for an account for the use of the same. A. L. Hodge claimed as heir-at-law, of Nehemiah Hodge, and as assignee of Zelia C. Hodge, another heir, and Amelia S. Hodge claimed as administratrix of Nehemiah Hodge, and as heir also.

In the case of the North Missouri Railroad, a general demurrer was interposed for want of equity. In the case of the Iron Mountain Railroad, a plea was filed, alleging that no letters of administration had been granted in the State of Missouri, and denying the title of the foreign administratrix.

TREAT, *District Judge*.—The question presented in the first case is, can the addition of a party, as plaintiff to a bill in equity, who has no interest in the suit, and who is not a necessary or proper party upon the record, be taken advantage of by a demurrer, for want of equity, or a general demurrer? I hold the affirmative to be established by the decisions both in England, and in this country. (Story Eq. Pl. § 509; *King of Spain et als. v. Machado*, 4 Russ. 225; *Cuff v. Platell*, 4 Russ. 242; *Makepeace v. Haythorne*, 4 Russ. 244; [105] *Clarkson v. Peyster*, 3 Paige, 336.) The reasoning in the case in 4 Russ. 225, seems conclusive on this point.

Is there any misjoinder of plaintiffs in this case? Under the patent laws, the interest of the patentee passes to the personal representative, who may apply for an extension or reissue of the patent, and it so remains until properly assigned. Until assigned all suits must be brought in the name of the administratrix; and the next of kin or heirs have no title in the patent. There is therefore in these cases a party plaintiff upon the record, who has no right to any relief or discovery, and the defendants are not to be harrassed by exceptions, taken by one who has no interest in the suit, nor can they be compelled to submit to him an inspection of their books and papers.

The demurrer in the case of the North Missouri Railroad must be sustained.

We next notice the plea, that no letters have been granted in this State. The title to patents for inventions is regulated by acts of Congress. By those acts the interest of the patentee passes to the personal representative in the State of the domicil, and remains in him until assignment to the parties beneficially interested therein, or to the vendee thereof in case of sale in course of administration.

KREKEL, J., concurs.

Plea overruled.

SCOTT ET AL. v. HOME INSURANCE COMPANY.

INSURANCE—EVIDENCE TO ESTABLISH FRAUDULENT BURNING.—In an action on a fire policy where the defense is that the assured burned the property, the rule in civil, and not the one in criminal cases, as to the *quantum* of proof, applies; but in view of the nature of the charge, the evidence to establish it ought to be such as clearly to satisfy the jury of its truth

CONFESSIONS—WHEN NOT EVIDENCE.—Confessions extorted from the plaintiff, or those not voluntarily made, should not be regarded by the jury.

[106] Before DILLON, J., TREAT, J., and KREKEL, J.

ACTION on fire policy. Defense: that the plaintiffs burned their own property, covered by the policy.

Similar actions had been brought by the plaintiffs on other policies. By consent, certain special issues were submitted to

the jury, and their answers were to be taken as applicable to all the cases. It was made a question on the trial as to the degree or *quantum* of proof requisite to establish the charge that the assured had themselves burned the property.

Certain confessions of one of the plaintiffs were given in evidence, without objection at the time, that they were not voluntary, but it was claimed by the plaintiffs that these confessions should be disregarded by the jury, because they were not voluntary, and made when they were under arrest on a criminal charge of arson. On these two points the court charged the jury as follows:—

DILLON, *Circuit Judge*.—The questions of fact specially submitted to you require at the hands of the court a statement of the rules of law applicable to the decision of such questions. The second interrogatory requires you to find “whether the plaintiffs or either of them caused, procured, planned, or instigated the burning, or whether either one of them set fire to the building, consented to or connived at the burning.” The charge of willful burning is made by defendants and must be proved by them.

In the trial of ordinary civil suits like the present, the jury determine the issues upon what is called the weight or preponderance of evidence. If the evidence preponderates in favor of the plaintiff, he is entitled to a verdict, though the evidence may not be so strong as to exclude all reasonable doubt. So if the balance is in favor of the defendant, the finding should be for him, although the jury are not convinced beyond all possible or even beyond all reasonable ^[107] question. This is the ordinary rule in civil actions. In criminal cases, where the United States or the government is plaintiff, the rule is different, and no mere weight of evidence is adequate to warrant a verdict of guilty unless it be sufficient to exclude all reasonable doubt.

One of the issues submitted requires you to find whether the plaintiffs set fire, or caused fire to be set, to the insured property; and it becomes the duty of the court to instruct you respecting the degree of proof essential to enable you to find that issue against the plaintiffs and in favor of the insurance company.

1. The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for willfully burning the property to defraud the insurance companies. On the contrary, as between the rule in criminal and the rule in civil cases, as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men in general will not commit, but of which men are sometimes guilty; in view of which, the court instructs you that in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence taken altogether must be such as *clearly satisfies* you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused or procured the act in question to be done.

On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule of law on the subject.

2. As to the question whether any or what weight should be given by you to the confessions in evidence, the court instructs you that any confessions extorted from either of the plaintiffs are to be entirely disregarded. It is a free and voluntary confession only that should be considered by you. It should be observed, however, that in a case like the present, ^[108] confessions made from hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence, and should be weighed by you with a view of ascertaining the exact truth.

In your deliberations you will bear in mind the distinction between the evidence outside of the confessions, and the confessions themselves. Though you should arrive at the conclusion to disregard all confessions, yet if evidence outside of the confessions satisfies your mind of the truth of any matter in issue, you will find accordingly. You are the exclusive judges of the weight of evidence. You may regard or disregard portions, or all of the testimony given by any witness, attribute little or great weight to the whole, or such portions as you may regard; in fine, deal in your deliberations with the testimony as you

may deem proper, always bearing in mind, however, the object, arriving at the truth of the matters submitted to you.

TREAT, J., and KREKEL, J., concurred.

Mr. Knox, for the Plaintiffs.

Sharp & Broadhead, for the Defendants.

Verdict for defendants.

ANDREWS, ASSIGNEE, v. GRAVES.

BANKRUPT ACT—ASSIGNMENT—PRACTICE.—Under a declaration upon the thirty-fifth section of the bankrupt act, alleging that the bankrupt did “transfer, assign, and convey,” etc., to the defendant, the plaintiff is not limited on the trial to the proof of a technical assignment under the State insolvent laws.

EVIDENCE—READING PAPERS ON TRIAL.—A judgment will not be reversed because papers recognized on the trial in evidence were not *formally* read.

DEPOSITIONS—RIGHT OF ADVERSE PARTY TO USE.—Under the circumstances stated in the opinion, it was held that the district court did not err in allowing a deposition taken and filed by one party to be read in evidence by the other.

EVIDENCE—RECORDS OF COURT AS.—Dates fixed by the records of the court may be stated to the jury as facts.

[109] **JURY—CHARGE VIEWED AS A WHOLE.**—The court will look at the entire charge to the jury, in order to ascertain whether the law was, upon the whole, fairly presented to them.

BANKRUPT ACT—THIRTY-FIFTH SECTION CONSTRUED.—Construction of the thirty-fifth section of the bankrupt act; and ingredients of a right of the assignee to recover thereunder, stated and commented on by TREAT, District Judge.

Before DILLON, J., and TREAT, J.

WRIT of error, to the district court for the western district. The action was brought by the assignee of Lawrence, against the defendant, under the thirty-fifth section of the bankrupt act. The plaintiff recovered, and the defendant sued out the writ of error, which now brings the cause before this court.

Glover & Shepley, for the Plaintiff in error.

E. T. Allen, for the Defendant in error.

TREAT, *District Judge*.—Many of the errors assigned are *dehors* the record. This was an action, substantially, of trespass

de bonis asportatis. The declaration avers that the bankrupt did on the (blank) day of October, 1869, "transfer, assign, and convey" (the statutory terms) to the defendant, etc.

The counsel below seems to have supposed the time material, and that the cause of action was limited to a technical assignment, as under the State statute, and consequently no evidence was admissible as to any other form of an alleged fraudulent transfer or conveyance, or as to any such transfer or conveyance at a different time from that stated in the declaration. The declaration is so framed as to cover any fraudulent transfer, assignment, or conveyance during the six months prior to the filing of the petition in bankruptcy. Hence all the errors assigned, which are based on the incorrect hypothesis of counsel below as to the cause of action, disappear.

[110] It is said there is no evidence that Andrews was adjudged bankrupt, or the plaintiff appointed assignee. The declaration avers these facts, and that the adjudication was made by the court which tried the case; and frequent reference is made at every stage of the records of the court in the bankruptcy proceedings, showing that those records were produced and recognized as in evidence. No objection was made below that they were not *formally* read or offered in evidence; but all parties treated them as before the court and jury.

It appears that the defendant caused the deposition of Higgins to be taken on notice, before Register Lindenbower, and that at the time and place designated both parties appeared by counsel and examined, cross-examined, and re-examined the witnesses at great length; that said deposition was duly filed in the cause, and that defendant moved to strike the same from the files, on the grounds set out in the written motion therefor, and subsequently objected to the plaintiff's reading the deposition for reasons stated. The grounds thus stated are, except in one particular, *dehors* the record, and for aught known to this court, the motion and the objections were overruled, because it was apparent to the court that they had no foundation in fact. It does appear that the deposition was taken before the register at the instance of the defendant himself, and with the assent of the plaintiff, that after being duly certified was placed on file in the case. In *Yeaton v. Fry*, 5 Cranch, 335, one of the errors

assigned was that the plaintiff was permitted to read in evidence depositions informally taken by the defendant under a commission, and the supreme court held that there was no error committed, Chief Justice Marshall delivering the opinion. That case does not expressly determine all the points here presented, but it decides that, when depositions are not taken *ex parte* or *de bene esse* under the Act of 1789, or both parties appear and examine and cross-examine, and the depositions are subsequently placed on file, the party at whose instance they were taken cannot object ^[111] to their being read by the opposite party on the ground of any irregularity or informality. Having taken a deposition under the circumstances named, he cannot except thereto, nor cause the same to be suppressed. The officer before whom taken ought to cause the same to be transmitted to the court, for the benefit of all concerned, and once on file the defendant could not suppress or withdraw it. Although a register has no authority to take such a deposition, yet he has full authority to administer oaths; and when by the assent of parties he has taken such a deposition to be used as evidence in the cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the defendant causing the same to be taken cannot object. The irregularity was defendant's, to which the plaintiff might have excepted, not the defendant.

We do not understand the record to show that there was any objection to the use of the deposition on account of the incompetency of the officer before whom it was taken; nor does the objection seem to have been made that one party could not use the deposition taken by another, had it been properly certified, returned, and filed. But there having been an appearance before the officer by counsel of both parties, and a full examination and cross-examination of the witness, and no showing that the witness was present in court, and the course pursued being conformable to the usual practice in the State, we unite in holding that the court did not err in allowing the deposition to be read, without now deciding that one party has in all cases an absolute right to use depositions taken by his adversary.

As the records of the court before the judge fixed the precise date at which Andrews' petition in bankruptcy was filed, and

were absolute verity, no error was committed in stating that date to the jury.

To determine whether there was error in charging the jury it is necessary to look to the whole charge, so as to ascertain whether one part thereof is not qualified by another, and thus [113] the law fairly presented. The definition of insolvency in this case (the defendant being a merchant) was not only correct, but the allusion to another provision of that act, as illustrative of the reason of the rule, was unobjectionable.

All through the charge the court endeavored to enforce upon the jury that it was their exclusive province to weigh the testimony, and determine what it established. Their attention was called to the testimony bearing upon certain points to be ascertained, and the rules of law in reference thereto stated. If the charge were to be considered as to each sentence or point, dissevered from the other sentences or points in the complex problem, room might exist for sharp criticism as to successive details; but the question for review is whether the law governing the case was fairly and correctly stated, and not whether another and different mode of presenting them would not have been more satisfactory to one or the other of the parties litigant.

The law on which is based the plaintiff's right to recover, requires these facts to be proved:—

First. The vendor was insolvent, or in contemplation of insolvency.

Second. The vendee had reasonable cause to believe such to be the condition of the vendor.

Third. The sale was made by the vendor with a view to contravene the provisions of the bankrupt act.

Fourth. The vendee had good reason to believe such to be the view or intent of the insolvent vendor in making the sale. (*Babitt v. Walbrun & Co. ante*, 19, 22.)

Hence as to the vendor, it must be shown that he was insolvent, etc., and that he made the sale with the view named; and on the part of the vendee, that he had reasonable cause to believe the status of the vendor to be as charged, and his purpose or intent to be in making the sale a contravention of the act.

In ascertaining the alleged fact of insolvency, it was proper to charge the jury in such a way as to give them a clear [113] view

of the legal meaning of the term. That was done. Not only was a correct definition of insolvency given, as applicable to a merchant, but it was illustrated by reference to another provision of the act. That illustration, so far from being ground of error, was quite appropriate, in order that the jury might have a clear understanding of the general proposition stated. So it was proper to direct the attention of the jury to the distinction between "reasonable *cause* to believe" and "actual belief"—between willfully shutting the eyes against demonstrative facts and circumstances, and their obvious existence. In that respect the charge was more favorable to the defendant than a stricter statement of the rule might have justified.

The statute declares what shall be *prima facie* evidence of a fraudulent transfer, and when such a *prima facie* case is made out, and no explanatory evidence is offered, it is unnecessary for the court to enter upon minute or elaborate distinctions as to the force and effect thereof. The case should be treated in the light of the law as applicable to the testimony produced, and not with reference to supposed or imaginary states of proofs possible to be adduced in some other cause. The jury are to be instructed and not confused; and there is no need of going beyond the legal requirements of the case presented. In the light of the testimony, the court was called upon to define the rules of law applicable thereto, and did so without repeating each element of the problem as it passed to the next in logical order.

The testimony sufficiently established the insolvency of the vendor, and reasonable cause in the vendee to believe the vendor insolvent. It also showed that the sale was made out of the ordinary course of business, and consequently there was *prima facie* evidence of fraud—fraud on the part of the vendor, in which the defendant was directly participating. If the law declares a sale under given circumstances, *prima facie* evidence of fraud, it is *prima facie* evidence to all concerned—to the vendee as well as to the vendor. It is difficult ^[114] to perceive how, when *prima facie* evidence of a fact is presented, a person has not reasonable cause to believe the fact to exist, or, in the language of the decision, "to be put upon inquiry."

Dealing with the case as it thus stands, the court below brought with sufficient clearness to the minds of the jury the

legal rules by which their action was to be governed, and guardedly stated that it was exclusively for them to give, even to the *prima facie* evidence, such weight as they might deem proper.

In referring to the testimony concerning the mortgage on the property of the bankrupt's wife, and the manner in which by the contrivance of the defendant and the bankrupt conjoined that mortgage was paid off at the expense of the creditors, the court used the strong language with which the law characterizes such a transaction. Certainly there is no assignable error on that ground. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large, if not the largest portion of the insolvent's property, and gives notes payable at long dates, and then cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, it is not improper to say the law frowns on such contrivances for using the bankrupt's means to the detriment of his honest creditors. The transaction obviously was the transfer of the bankrupt's property to his wife in fraud of his creditors, through the agency of the wife's father for the benefit of herself and of his son, the mortgagee.

The defect in the declaration was cured by the verdict under the statute of joefails.

DILLON, C. J., concurs.

. Affirmed.

[115] [NOTE. — In the circuit court for the eastern district of Arkansas, at the April term, 1871 (present DILLON J., and Caldwell, J.), it was held, that where the plaintiff had taken *ex parte* a deposition *de bene esse*, and subsequently in like manner took the second deposition of the same witness upon the same subject, and read the last in evidence (which referred to the first), that the defendant might read to the jury the first deposition; and the case was distinguished from *Sexton v. Brock*, 15 Ark. 345, where this subject is fully considered, and the cases collected and reviewed by Mr. Chief Justice Watkins. See also *Yeaton v. Fry*, 5 Cranch, 335.]

GIDDINGS, ASSIGNEE, v. DODD, BROWN, & CO.

BANKRUPT ACT—THIRTY-FIFTH SECTION—ILLEGAL PREFERENCES.—Creditors who receive an illegal preference are liable to the assignee of the bankrupt; and the intent of the debtor to give, and of the creditor to secure an unauthorized preference, may be shown by circumstances.

Id.—Facts establishing an illegal preference stated.

Before DILLON, J., and KREKEL, J.

THIS cause comes before the court on a writ of error, to the district court for the eastern district. Giddings, the bankrupt, in October, 1869, was a country merchant, owing \$6,000, and having assets to the amount only of \$2,400.

In that month he sold his entire stock of goods to one Pendleton, for \$1,800, who executed two notes to Giddings therefor, one for \$1,373, and the other for \$392. In January, 1870, Dodd, Brown & Co., to whom Giddings owed \$1,400, on a business note long past due, having failed to obtain payment or security from Giddings, commenced an attachment suit against him on the ground that he had made a *fraudulent disposition* of his property, and attached the goods sold to Pendleton, and garnished him with respect to the note he had executed to Giddings. The note for \$392 had been turned out by Giddings to another creditor. Shortly after the attachment was served, this arrangement was made at the instance of Pendleton, to wit: Pendleton was to procure Giddings to agree to ^[116] turn out the note for \$1,373, which he held against Pendleton, to Dodd, Brown & Co. Pendleton was intrusted by Giddings with this note. Defendants agreed to receive it in payment *pro tanto* and did so, and surrendered it, cancelled, to Pendleton, on receiving in substitution for it his indorsed and secured note for the same amount and payable at the same time, and the \$1,373 was indorsed by the defendants as a credit on their debt against Giddings, and the attachment released. Within four months thereafter, Giddings was forced into bankruptcy, and the plaintiff, as his assignee, brings this action under the thirty-fifth section of the bankrupt act, to recover the sum of \$1,373, on the ground that it was paid and received as a preference under circumstances which made it void, against the other creditors of the bankrupt.

In the district court a jury was waived, and the plaintiff

recovered. The defendants sue out a writ of error to this court, and complain of the legal propositions which the district court held to be applicable in the case.

Among other things the court (TREAT, J.) declared the law applicable to the case as follows:—

“If a debtor is insolvent a payment by him to one of his creditors is, by presumption of law, made with a view to give a preference, and consequently is a fraud upon the provisions of the bankrupt act, inasmuch as the natural and necessary consequence is the payment of one creditor without the means of like payment to the other creditors, whereby the equality among creditors of an insolvent intended to be secured by the act is defeated. Hence, if Giddings was insolvent, and the defendants received payment from him, having at the time reasonable cause to believe him insolvent, the payment was made with a view to give a preference and in fraud of the provisions of the act, and the defendants had reasonable cause to believe such to be the debtor's intent. The same rule of law obtains whether the debtor made the payment under such circumstances with or without pressure from the creditor — willingly or otherwise.”

[117] *Rankin & Hayden*, for the Plaintiff in error.

Thomas A. Russell, for the Defendants in error.

DILLON, *Circuit Judge*.—The thirty-fifth section of the bankrupt act makes payments to creditors in violation of its provisions void, and gives the assignee the right to recover the amount of the illegal preference.

The only questions which can be now reviewed are those arising on the declaration of law above mentioned.

It correctly states the elements which must concur to invalidate a payment made with a view to give a preference.

But it is objected by the defendants that the rule of law declared may be abstractly correct, yet it was inapplicable to the circumstances of the case, since the evidence negatived any intent on the part of Giddings to give a preference, as he was either passive on the matter, or acted only at the instance of Pendleton, and the argument is, that if *Giddings* had no intent to give a preference, then it is not possible that the defendants

could have "had reasonable cause to believe that such payment was made (by him) in fraud of the provisions of the bankrupt act."

But it is undeniable that Giddings did consent to and did turn out the note against Pendleton to the defendants. He owed in all about six thousand dollars, and the note he thus gave in payment to the defendants constituted the bulk of his available assets. What could he have meant but to give them a preference? By the payment to them the defendants secured a preference—the lion's share of his assets, and this, too, when they knew he was insolvent and had made acts which are acts of bankruptcy grounds for their attachment against him.

If under the circumstances these defendants can retain the advantage they sought to derive from the attachment and through that agency secured, manifestly the purpose of the bankrupt act, which is intended to prevent preferences and [118] put all general creditors upon an equal footing, is subverted. (See *Linkman v. Wilcox*, *post*.)

KREKEL, J., concurs.

Affirmed.

Note. *Illegal Preferences Under the Bankrupt Act*, whether voluntary or involuntary, render creditor liable to assignee. — Cited, *Alderdice v. State Bank*, 11 Bank. Reg. 407; *Strain v. Gourdin*, 2 Woods, 384.

FAUNTLEROY v. HANNIBAL.

MUNICIPAL CHARTERS JUDICIALLY NOTICED.—The courts will judicially notice powers of a public nature conferred upon a municipal corporation, created by legislative act, though the act is not in terms declared to be public.

Before DILLON, J., TREAT, J., and KREKEL, J.

DILLON, *Circuit Judge*. — This is an action on certain coupons attached to bonds issued by the city of Hannibal to the Pike County Railroad Company of Illinois, in 1858, to aid in the construction of that railroad. The defendant demurred to the declaration on the ground that the act amending the charter of the city of Hannibal and authorizing it to subscribe to the

capital stock of the company, was not set forth in the declaration; also that as neither that act nor the charter of the city were declared to be public acts, the courts could not take judicial notice of them.

The court, upon consideration, is of opinion that the act is in its nature public, though relating only to the powers of a single municipal or public corporation; and consequently, that it can judicially notice it without a declaration therein that it is a public act. Charters for the government of cities and towns are, in this country, public in their nature, and not special or private acts.

TREAT, J., and KREKEL, J., concur.

Demurrer overruled.

Dryden & Dryden, and *Grant & Smith*, for the Plaintiff.

Carr & Wilson, for the Defendant.

[119] NOTE. — Courts will judicially notice the charter of a municipal corporation without being pleaded, not only where it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect; but the ordinances thereof are not public, and must be pleaded. (*State v. Mayor etc.* 11 Humph. 217; *Aldermen v. Finley*. 5 Eng. 423, 516; *Beatty v. Knowles*, 4 Peters, 152, 157; *West v. Blake*, 4 Blackf. 284; *Briggs v. Whipple*, 7 Vt. 15, 18; *Case v. Mobile*, 30 Ala. 538; *Young v. Bank*, 4 Cranch, 884.)

Public Acts Judicially Noticed by Courts. — Cited, *Cluck v. State*, 40 Ind. 273.

ALLIN v. ROBINSON.

REMOVAL OF SUIT — REQUISITES AS TO CITIZENSHIP. — Where the plaintiff, being a citizen of the State, brought ejectment in the usual form, in the State court, against the defendant, also a citizen of the State, who pleaded to the merits, and a third person, a citizen of another State, was, on his own application, made a co-defendant, but filed no plea; and both joined in a petition for the removal of the cause to the federal court, stating no facts in relation to the ownership of the land, or their relation to each other, and the court ordered the removal. *Held*, that the cause was improperly transferred; and the same was remanded.

EJECTMENT — REMOVAL BY NON-RESIDENT LANDLORD. — Whether the non-resident landlord may, in such case, where the title is in dispute, and the resident defendant is a mere tenant, have the cause removed on proper petition under the Act of July 27, 1866, *quære*.

Before DILLON, J., TREAT, J., and KREKEL, J.

ALLIN commenced in one of the courts in Missouri, and pursuant to the statutes of the State, an action of ejectment against Robinson. In form the action is possessory, the petition alleging that the plaintiff is entitled to the possession of the property (which is described), and that the defendant wrongfully detains the same from him. Robinson was served and filed an answer denying the allegations of the petition, and claiming the property in his own right. Subsequently, one Prince appeared, and stating to the court that he was the legal owner of the land, asked to be made a *co-defendant*, and the court granted his application. Prince has no answer ^[1866] or other pleading on file. In this condition of the case Robinson (both he and the plaintiff being citizens of Missouri), and Prince, who is a citizen of Illinois, joined in an application to the State court to have the cause removed to this court. The petition for the removal stated only that the value of the land exceeded five hundred dollars, and that Prince was a citizen of the State of Illinois. It contained no statement concerning the ownership of the land nor the relations which Robinson and Prince sustained towards each other in respect thereto.

On this petition the State court made an order, removing the whole cause as respects *both* defendants, to this court; and here the plaintiff now moves that the cause be remanded to the State court, on the ground that it was improperly transferred.

Ewing & Holliday, for the Plaintiff.

Krum & Decker, and *Edmund T. Allen*, for the Defendant.

DILLON, *Circuit Judge*.—The defendant's counsel in argument seeks to support the order of removal on the ground that Prince is the real owner, and Robinson but his tenant, and that the action, though in form possessory, is in reality brought to try the title which is in dispute between the plaintiff and Prince; and he claims that under such circumstances, Prince, as a non-resident, had, under the Act of July 27, 1866 (14 U. S. Stats. 306), a right at all events, to have the cause removed as to him, and that if remanded it should be remanded only as respects Robinson. Prior to the Act of 1866, just mentioned, it is clear that Prince having been admitted as a *co-defendant*, and standing

on the record as such, could not have the cause removed, since it was not removable as to Robinson, he being a citizen of Missouri. (*Torry v. Beardsley*, 4 Wash. C. C. 242.) Title may be tried in this form of action as was adjudged by the supreme court of the United States, in *Miles v. Caldwell*, 2 Wall. 35; and if in this case ^[1861] Robinson had filed an answer disclaiming all title or right, or claiming under Prince, and the latter had shown in his petition that he was a citizen of Illinois; that he owned the land, that the action involved his title thereto, that its value exceeded the sum of five hundred dollars, and asking a removal as to him, we would have then presented for decision the question which the defendant's counsel has argued, but which does not arise upon the record of the proceedings in the State court. On the face of those proceedings the order for the removal was erroneously made, both as respects Robinson and Prince, and the cause as to both must be remanded.

TREAT, J., and KREKEL, J., concur.

Motion sustained.

Note. Removal of Cause to Federal Court will be ordered, when the interest of parties is joint, only where each of the parties is competent to sue in the federal courts. — Cited, *Case v. Douglas*, post, 800.

FALLON ET AL. v. THE RAILROAD COMPANY.

SPECIFIC PERFORMANCE OF RAILWAY CONTRACTS. — The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for its road, to erect the necessary buildings, and to build the bridges, etc., and were to be paid in mortgage bonds and stock, but the complainants (in consequence as alleged, of defendant's fault) had not entered upon the work; the road-bed to be graded and prepared by the company was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors, seeking to enjoin the company from making a contract with others to iron and equip the road, and praying a *specific execution* of their contract with the company, and refused to retain the bill for compensation.

Before DILLON, J., TREAT, J., and KREKEL, J.

On demurrer to the bill. On the 13th day of August, 1869, by written contract of that date, the plaintiffs agreed with the

defendant, the Missouri and Mississippi Railroad Company, to furnish and lay down all the iron rails, chairs, and spikes for its railroad from Glasgow to Clark City (a distance of one hundred and twenty-one miles), to fill up and surface the track, to furnish all locomotives ^[1870] and rolling stock, and to erect the necessary buildings, all of which was to be done on or before December 31, 1871. The defendant, on its part, agreed with plaintiffs to obtain the right of way; to grade and construct the road-bed and all bridges, to furnish ties, and to have the road in such condition that the iron could be readily laid down on or before the 1st day of August, 1870. By the contract the company was to pay the plaintiffs for the iron, rolling stock, and work, which they contracted to do, the sum of forty thousand dollars per mile, twenty thousand dollars of which were to be paid in the first mortgage bonds of the company, and twenty thousand on its capital stock, said payments of bonds and stock to be made from time to time, on the completion of each five miles of tract, or earlier, or otherwise, as thereafter provided in the contract. It was stipulated that the bonds should be the first and exclusive lien upon the whole road and its equipments; they were to be made to mature in forty years, and draw seven per cent interest per annum. The capital stock was to be limited to thirty thousand dollars per mile, of which the company could only expend ten thousand dollars per mile in preparing the road-bed, and for expenses.

It was further stipulated that the bonds were to be issued and delivered to a trustee within ninety days, and that the plaintiffs might use or sell the same, or any part of them, for iron or rolling stock, and if sold for cash the proceeds were to be deposited with the trustee in their stead, to be drawn on the order of the company to pay for the iron and materials, which were to be bought and shipped in the name of the company and to be its property; but said iron and materials were to be used by the plaintiffs to build the railroad. None of the bonds or stock were to be drawn from the trustee except by consent or order of the company, and only to pay for iron and materials, or labor, or estimates due.

The company agreed to pass all orders and do all acts needful to enable the plaintiffs to obtain and sell the bonds and stock, to

buy the iron and rolling stock, whenever the plaintiffs should request it to be done.

[123] It was stipulated that when the company should finish the road-bed and bridges, and deliver the ties for the road from Clark City to Macon City (which was to be on or before August 1, 1870), and give assurance that it would complete the balance in a reasonable time, that the plaintiffs should commence at both ends to lay down track.

The bill, which was filed October 25, 1870, sets out the contract *in extenso*, and avers that the plaintiffs have always been ready, willing, and able to perform the same on their part; and alleges that the company has failed to keep it on its part, and has prevented the plaintiffs from complying therewith.

It is averred that on part of the route the right of way has not yet been obtained, nor the road located, and no grading been done; that on other parts of the route grading has been done, but the road-bed and bridges have not been completed nor the ties delivered; that the company has never notified the plaintiffs that the road-bed was ready for the track; that it has never executed the mortgage or bonds, never issued the stock, nor deposited the same with the trustee. The bill alleges that in September, 1870, the plaintiffs, with their own means and credit, contracted for the purchase of iron, materials, and locomotive cars for the defendant's road, to the extent of between twenty-five and fifty miles, and have incurred therefor liabilities in the sum of nine hundred thousand dollars, and that a considerable portion of the iron and materials thus purchased has been delivered to the plaintiffs, and fifteen hundred tons of iron are on the way to the defendant's road.

The bill states that on the 12th day of October, 1870, the plaintiffs, in writing, notified the defendant of their readiness to comply with their contract, and that on the 18th day of October, 1870, the defendant's directors passed a resolution reciting that the plaintiffs had wholly failed to comply with their contract "for the grading, tying, and bridging the road from Clark City to Edina, and the contract for ironing the road from Clark City to Macon City, and from Glasgow to Salisbury, [124] and thereupon resolving that the company is no longer bound by the contract, but will make other arrangements for the speedy com-

pletion of its road"; of which resolution the defendant gave the plaintiffs notice.

The bill alleges that it is true that on the 13th day of August, 1869 (the date of the contract before mentioned), the plaintiffs contracted with the defendant to do all the earth work and bridging, and to furnish all the ties for the road from Clark City to Edina, as the same *should* be surveyed, and to commence within sixty days from the time the plaintiffs should have been notified in writing by the defendant that it had all the bonds and stock mentioned in said contract in the hands of one A. Bechtel, for the benefit of the plaintiffs, which notice was never given, nor the bonds and stock deposited with Bechtel, nor the route finally located between those points. The bill avers that the defendant is endeavoring to make a new contract with others for ironing and equipping its road, and will do so unless enjoined; that it has determined to and will execute a first mortgage on the road to others unless restrained; and will issue, assign, and pass away the stock; to all of which the plaintiffs allege themselves to be entitled. That defendant will not keep said contract with plaintiffs unless compelled by the court; that unless the plaintiffs are permitted to iron and equip the road, and receive the mortgage bonds and stock, they will be without remedy, and if the defendant makes the mortgage to others, as it intends to do, and passes away the bonds and stock, it will be unable to respond in damages to any action at law which the plaintiff might bring.

And the prayer of the bill is that the defendant be compelled specifically to perform the contract, and that it be enjoined from preventing the plaintiffs from complying with their contract when the road-bed is ready; that the defendant be ordered to execute and deliver to the trustee the stipulated bonds and mortgage and stock, and to cause the mortgage to be properly recorded; that defendant be preliminarily enjoined ^[125] from making any contract with others to iron and equip the road; from transferring to others the mortgage, bonds, and stock, and from doing any act to prevent plaintiffs from complying with and completing their contract; and that the injunction be made perpetual on the hearing. The bill also asks for general relief.

No preliminary injunction has been allowed, and the bill is now before the court on a general demurrer.

Noble & Hunter, and *Jas. A. Clark*, for the Demurrer.

Glover & Shepley, opposed.

DILLON, *Circuit Judge*. — The main purpose of the bill is to compel the defendant specifically to execute the contract of the 13th day of August, 1869. Whether equity will decree a specific performance or leave the parties to their remedy at law, rests in the discretion of the court to be exercised in view of the special circumstances of the particular case. And the settled rule is that equity will leave or remit the parties to law where the remedy in the legal forum is plain, adequate, and complete. But if the remedy there is doubtful or inadequate, or will not so completely effectuate justice, and specific execution be practicable, equity will entertain jurisdiction and decree it.

Upon the case made by the present bill the court is of opinion that it cannot decree the specific execution which the complainant seeks. Bills of the same general character with the one before us, and, in principle, not distinguishable from it, have repeatedly and upon full consideration, been held in England not to be maintainable. (*South Wales Railway Co. v. Wythes*, 1 Kay & J. 186; *Ranger v. The Great Western Railway Co.* 1 Eng. R. Cas. 1, 51; *Peto v. Brighton etc. Railway Co.* 1 Hem. & M. 468; 1 Story Eq. 10th ed. 778 a, and note.)

The grounds upon which this doctrine rests are so fully set forth in the opinions in these cases that it is unnecessary ^[186] to restate them, or enlarge upon them. No cases in this country holding a contrary view, or denying the soundness of the English decisions have been called to our attention. The question upon authority, therefore, is decisively against the complainants.

But if the question be not regarded as controlled by authority, the circumstances of the present case are not such, in our judgment, as to call upon the court to decree a specific execution.

The proposed road is one of considerable length, and requiring a large sum of money to construct. A large portion of the road-bed and bridge is unfinished. For part of the distance the right of way has not yet been secured, nor the route finally located.

We cannot know that the resources and credit of the company are such that it would be practicable for it to carry into execution any order we might make to comply with its part of the agreement. Comparatively but a small proportion of the contract has been actually performed by the complainants. The difficulties which the court might reasonably expect to meet in attempting to enforce from both parties a specific execution in all its parts of a work of this nature are many and great. Compensation in damages would, under these circumstances, appear to be a much more plain and practicable and just as adequate and complete a remedy as a specific execution, and less oppressive or injurious in its effects to the defendant.

TREAT, J., and KREKEL, J., concur.

Demurrer sustained.

[Since the foregoing opinion was delivered, the case of *Ross v. The Union Pacific Railroad Co. (East Division)*, 1 Woolw. 26, has been published, in which Mr. Justice Miller, after full consideration of the subject, upon the authorities and upon principle, held that such a contract, when principally executory, would not be specifically enforced. ^[1871] In the case of *Fallon v. The Railroad Co.*, after the demurrer was sustained to the bill, the question was made and argued by the same counsel, whether the bill ought to be retained for compensation. And upon this subject the opinion of the court was against the complainant, and was delivered by Mr. District Judge TREAT.]

TREAT, *District Judge*.—This case is now before the court on a single proposition, viz., whether the bill should be retained for compensation.

In the opinion delivered heretofore upon the main object of the bill, viz., to secure a decree for specific performance, it was held that no such decree could be had; but it was suggested that possibly the court could properly retain the cause for the purpose of securing compensation to the plaintiffs for the breach of contract, especially under the averment that certain securities by the terms of the original contract were to be for the benefit of the plaintiffs.

The argument and authorities on this subject are reducible to this proposition, that a court of equity should not, "except under particular circumstances" (nowhere defined), in a case like the present, retain the bill for the purpose of awarding and securing compensation for the breach of the contract. That rule means, that although generally the bill will not be retained for compensation when the court is compelled on equitable principles to refuse a decree for specific performance, still there may be special circumstances developed which require, in order to prevent gross wrong and injustice to the plaintiff, that compensation should be given, and under those circumstances, it may proceed to do so when no special oppression or injury would thereby be done to the defendant. The judicial discretion involved is, however, to be exercised with due regard to the rights of both parties.

The case presented is, for the purposes of this question, simply this: Instead of proceeding, as they had a right to do under their contract, to negotiate for the purchase of iron, [188] etc., or to purchase, with the means to be furnished therefor by the defendant, the property purchased to be in the name of and for the company, as its own, the plaintiffs chose to buy in their own names and with their own funds some property of the kind described, and negotiate on their own responsibility for more. It is averred in the bill that some of the property so purchased has been delivered to the defendant, and that outstanding liabilities have been incurred as just stated. What loss or damage they have suffered thereby, if any, does not definitely appear. But those dealings were *dehors* the contract.

It is stated that the defendant is about to make a new contract on the same subject-matter with other persons, and to execute bonds and mortgages in connection therewith, whereby plaintiffs will be practically remediless at law. It is not necessary to inquire whether the attachment act of the State or the bankrupt law would, under the supposed contingency, afford adequate means of redress; for the important facts apparent on the face of the bill must determine the action of this court. What are the damages, and how ascertainable, with a view to compensation? The road has scarcely been commenced. Here, then, is a railroad yet to be built, and at nearly the inception

of the enterprise, a court of equity is asked to retain a bill filed for specific performance of a contract for doing most of the work therefor, which relief cannot be granted in consequence of the intrinsic difficulties of the case as connected with equitable jurisdiction and administration—to retain that bill for the purpose of ascertaining the amount of damages to be awarded for the alleged breach of the contract. The damages actually sustained thus far, if any, did not occur under the specific terms of the contract. The damages ultimately recoverable depend on many matters which have not yet occurred, and which may never occur, and which, if they do occur, may be in such ways as yet unknown, and under such unknown conditions as leave no definite mode of causing such unliquidated and speculative [120] damages to be reduced, before the road is completed, to any ascertainable sum for which a charge can now be made as a lien on the unbuilt road. It may be that the road, if built by the plaintiffs from the proceeds of bonds and stock as contemplated, the price they would bear in the market being unknown, would cost more than the sum agreed in the contract, and hence instead of a loss of profits to the plaintiffs from the breach the reverse would follow. If others build the road in the same way, in the most economical manner, even if all the bonds and stock do not have to be sold for the purpose, the value of the remaining stock and bonds contemplated to be paid to the plaintiffs at that time cannot be now ascertained, and consequently there is no practicable way whereby this court can determine for what sum to charge a lien on this road, as security for compensation in the way of possible and unascertainable profits. If the road is not built and equipped it is of no value, and a charge upon it would be worthless as security to plaintiff for *any* sum; and if it be charged in advance under a decree of this court, with an uncertain sum to be hereafter ascertained, the road probably can never be constructed. Hence the intrinsic difficulties presented on equitable rules. If the road were completed or nearly finished the case might be different, for the court would then have something definite on which to act, without destroying the contemplated enterprise. But a road to be built on credit, when scarcely begun, stands in a strange position as to the question here to be considered.

The security sought for prospective damages, or rather for loss of profits, would necessarily destroy the *value* of the security; would, if given, make the security worthless, and prevent the defendant from obtaining, by completing the work, the only means of compensating the plaintiffs.

It is in view of these, and like considerations, which must necessarily suggest themselves to the minds of the counsel, that the court is constrained to decide that the bill cannot be retained for compensation.

DILLON, J., and KREKEL, J., concur.]

Bill dismissed.

[130] WELCH v. STE. GENEVIEVE.

MUNICIPAL CORPORATION—NOT DISSOLVED BY FAILURE TO ELECT OFFICERS.—A municipal corporation, created by legislative act for public purposes, is not dissolved by its failure to elect officers.

RELATION OF OFFICERS TO CORPORATION—The officers of our municipal corporations do not, in the sense of the English books, constitute an *integral part* of the corporation, but are the mere agents or servants of the corporate body. (*Arguendo* by the circuit judge.)

MUNICIPAL CORPORATION—DISSOLUTION FOR NON-USER OF FRANCHISE.—Municipal corporations cannot be dissolved by the courts for non-user, or misuser of their powers or franchises. (*Arguendo* by the circuit judge.)

MUNICIPAL CORPORATIONS—RIGHTS OF CREDITORS—MANDAMUS TO COLLECT TAX.—Where a judgment existed against a municipal corporation, having no property on which an execution could be levied, and whose duty it was to levy and collect a special tax to pay the judgment, and where the corporation was without officers and would not exercise the powers it had to supply itself with officers, the court appointed its *marshal a special commissioner to assess, levy, and collect the requisite tax*; but suspended the execution of the order so as to allow the corporation time to elect officers, and itself to levy and collect the tax.

MISSOURI OUSTING ORDINANCE CONSTRUED.—The *Ousting Ordinance* passed by the constitutional convention of Missouri, and the general incorporation act of that State, in relation to towns, construed.

Before DILLON, J., TREAT, J., and KREKEL, J.

MOTION to appoint a commissioner to levy and collect taxes to pay the plaintiff's judgment. The case is this: On the 9th day of September, 1865, the plaintiff filed in this court his declaration on certain negotiable bonds issued by the city of Ste. Genevieve, and the summons was served on the 11th day of the

same September, on "Francis C. Rozier, president of the board of aldermen, and acting mayor" of the said city. The record in that case recites an appearance by counsel for the city and an agreement that the defendant will enter its appearance at the next term. At the October term, 1866, judgment by default was rendered against the defendant for \$5,605.

In May, 1870, the plaintiff filed his petition in this court [131] for a mandamus, stating therein the recovery of the above mentioned judgment; that execution had been issued and returned *nulla bona*; that the debt remains unpaid; that no tax to pay the same has ever been levied; that Francis C. Rozier was the last elected mayor, and certain other persons named were the last aldermen of the city; that they duly qualified when elected, and served, and are still, in law, officers of the corporation; that no election has been held, and that the failure to elect is for the purpose of preventing the petitioner and others from collecting their bonds; that there is no way in which the petitioner can collect but by the relief prayed for, which is a writ of mandamus to compel Rozier and the aldermen named to levy a tax upon the inhabitants and property of the city sufficient to pay the judgment.

An alternative writ was issued as asked, to which, at the October term, 1870, Rozier and the other persons named made return as individuals, and not as mayor and aldermen of the city. They set out in substance in this return that they were the mayor and aldermen of the city on the 4th day of July, 1865; that on that day the new State constitution was put in force, containing an ordinance (popularly known as the *ousting ordinance*), by which it was provided that within sixty days thereafter every person holding any office of honor or profit under the State, and in *any municipal corporation*, should take and subscribe the oath of loyalty therein prescribed, failing to take which oath within sixty days, said office, it was declared, should *ipso facto* become vacant, and the vacancy should be filled according to the law governing the case; and it was made penal to hold or exercise any of said offices without having taken and subscribed the oath.

These persons return that they failed to take the oath, whereby their offices became vacant on the 4th day of Septem-

ber, 1865 (five days before the plaintiff's original suit was brought), and they have not since acted. It was also stated in the return that in August, 1865, a pretended election was held, and city officers elected, who had taken the ^[123] oath of loyalty, but that these persons refused to qualify, and never did qualify or act; but that no record of this election can be found.

The return refers to the act of the legislature of the State of Missouri, approved February 19, 1866 (Stats. 1865, p. 911), which recites that "on account of past troubles of the country, certain incorporate towns and cities in this State have failed to hold their regular elections for offices now vacant and elective under their respective charters," and enacts "that any justice of the peace residing within the limits of any such incorporated town or city is required, on the petition of twenty-five qualified voters of such town or city, to order at once a special election to fill all vacancies in offices elective under their respective charters," etc.

The return states that no election whatever has been held under the aforementioned act, approved February 19, 1866, and that the books and papers of the corporation are in the office of the clerk of the court.

The return then sets up that, on the 4th day of June, 1867, the county court of Ste. Genevieve County, acting under general laws of the State concerning municipal corporations, declared the "town of Ste. Genevieve" incorporated by the name of "the inhabitants of town of Ste. Genevieve," and a certified copy of the proceedings of the county court in this regard are filed with the return; and the respondents deny that they are officers of the city, and claim that by the constitutional ordinance aforesaid, they are absolutely forbidden to act as such officers, and they ask to be dismissed.

On this return the respondents were discharged, and now Welch, the judgment creditor, files his petition stating the above facts, and that there are not now, nor have there been for some years past, any officers of any kind in said corporation; that said corporation exists; that it has no property on which to levy; that his judgment is yet unpaid, and asking this court to appoint the marshal, or some competent person ^[123] to assess,

levy, and collect, upon the taxable property within the corporation, a tax sufficient to pay the judgment.

It is this petition which is before the court for action.

Glover & Shepley, for the Plaintiff.

Thomas C. Reynolds, *contra* (*amicus curiæ*).

DILLON, *Circuit Judge*.—This application presents novel and interesting questions, some of which are of first impression. These will be noticed, however, only so far as may be necessary to reach a conclusion. The city corporation not now appearing by counsel, and the record of the judgment upon the bonds against the city reciting an appearance by it, and service of the summons having been made upon the last chief officer of the city, the validity of the judgment must, in this proceeding, be assumed. (1 Rev. Stats. 1855, § 2, art. 2; *Muscatine Turnverein v. Funck*, 18 Iowa, 469.)

The city of Ste. Genevieve was specially incorporated in 1849, by a public act of the legislature of the State. (Laws 1849, 298.) Its charter has been several times amended, and it was in 1851 expressly authorized to issue the bonds to the plank road company, on which the plaintiff's judgment was rendered (Act February 7, 1851); and it was subsequently authorized to levy and collect annually, a special tax, to pay interest on such bonds. (Act February 23, 1853.)

The constitution of the corporation is after the usual model of municipal corporations, having a special charter; the inhabitants are the corporators, the mayor is the chief executive officer, and the aldermen constitute the governing body.

It is suggested that the corporation thus created has been *dissolved* because of its failure to elect municipal officers, and the disuse of its corporate functions since September 4, 1865, when all of the municipal offices became absolutely vacant by force of the ousting ordinance passed by the constitutional convention. To this proposition I cannot give my assent. I deny that a corporation created by the legislature for the purposes of local municipal government can, without ^[184] a provision to that effect, be *dissolved* by the mere failure to elect officers. The corporation is created by the charter. The officers do not constitute *the* cor-

poration, nor does the council even constitute a corporation. The inhabitants of the designated locality are the corporators. The officers are the mere servants or agents of the corporation. Municipal corporations are created for public purposes, being auxiliaries of the State to assist in local administration.

The effect at common law of the dissolution of a corporation was, that debts due by and to it were discharged, and its property reverted to the grantors. Formerly, corporations of all kinds, in England, both private and municipal, were usually created by royal charter, and the courts in that country have held, or assumed, that the loss of an integral part would dissolve a municipal corporation, or at least suspend its existence, and that its charter might, for a misuse of its franchises, be declared forfeited by judicial sentence in *quo warranto*, as in the famous case against the city of London in time of Charles II. Upon a critical examination of the decisions in England, I doubt whether it is settled law even in that country, that a municipal corporation can be totally *dissolved* in either of these ways; but if so, the doctrine has no application to our municipal corporations which are brought into existence for public purposes, by legislative act, and which do not, in the sense of the English books, consist of integral parts.

For non-user or misuser, courts may judicially declare forfeited the charters of private, but not of public, corporations.

The charter or constituent act of the corporation of Ste. Genevieve not being limited in duration, and not having been repealed by the legislature, is still in force, and the artificial body which it created still exists.

Under the constitution of the United States, which prohibits a State from passing any act which impairs the obligation of contracts, it may be doubted whether it would be possible even for the legislature of the State, notwithstanding its general [185] supremacy over the public corporations, to dissolve a corporation so as to defeat the rights of its creditors. (*Van Hoffman v. Quincy*, 4 Wall. 537; *Butz v. Muscatine*, 8 Wall. 583.)

But if the State has the power, it has not attempted to exercise it; on the contrary, the Act of February 19, 1866, recognizes, in the clearest terms, the corporations as still existing, notwithstanding their failure to hold their elections for offices

made vacant by the ousting ordinance; and provides a method by which elections may be held, and corporate officers supplied. There is much discussion in the adjudged cases, and some contrariety of opinion with respect to the right of officers to hold over in the absence of express provisions, beyond their terms, and until their successors are elected and qualified. But that question is not in this case, because whatever might otherwise be the legal right of the officers of the city to hold over, they cannot do so if they fail to take the oath required by the ousting ordinance.

The officers of the city having failed to take the prescribed oath, their official existence was absolutely at an end on the 4th day of September, 1865, and at that time the corporation had no legal officers. The corporation offices became vacant, and not having been filled, are still vacant. And we have the anomaly presented of a public corporation without any officers *de jure* or even *de facto* to execute its powers or fulfil its duties.

It is now suggested that the old corporation, if not dissolved in the manner before considered, was nevertheless dissolved or superseded by the organization in 1867 of the *town corporation* by the county court, under the general laws of the State. (Rev. Stats. 1865, ch. 41, p. 240.)

If it was thus superseded the inquiry would arise whether the town corporation was anything more than the authorized legal successor of the old corporation, and bound to discharge its obligations.

But on examining the above mentioned statute, under [126] which the supposed new incorporation was attempted, and on which it rests for all the legal virtue it possesses, we find that it only authorizes, in the mode therein prescribed, the incorporation of towns and cities not already incorporated. It does not empower a town or city incorporated by special charter, and which cannot therefore destroy its corporate life at its own pleasure, to abandon its charter without the consent of the legislature which gave it, thereby leaving the locality without municipal government or rule.

Legislative sanction is, in this country, indispensably necessary to the existence of every corporation; and as this new town organization is without legislative authority, it is wholly

without validity, and its officers have no right in law to exercise powers under the general incorporation act; much less have they the right to exercise the functions of officers under the special charter.

The city corporation being that which was established by the legislature under the charter, and that corporation remaining in existence, although it is without officers, it is clear that no validity can attach to an unauthorized organization under the general law. Offices must be *de jure*, but officers may be such *de facto*. To say that an officer is one *de facto*, when the office itself is not created or authorized by the legislature, is a political solecism, having no foundation in reason nor support in law. (*Decorah v. Bullis*, 25 Iowa, 12, 18; *Hildreth Heirs v. McIntyre's Devisees*, 1 Marsh. J. J. 206; *The People v. White*, 24 Wend, 520, 540.)

If the gentlemen who are claiming under the new organization to be the officers of the town had been elected under the charter, though irregularly, and were exercising and claiming to exercise the powers given by the charter, which is still the organic act of the municipality, they would be, in the true sense of the term, *officers de facto*, and their acts as respects the public would be valid, and this court might, notwithstanding the irregularities in their election, issue its mandamus to them to levy and collect the tax necessary to satisfy the plaintiff's judgment.

[187] But they were not elected under the charter, nor do they claim or assume to be officers of the city; and hence they could not lawfully levy or collect the tax; and there is no duty resting upon them in this respect which this court could compel them to execute by its writ of mandamus.

The corporation under the special charter, and its amendments, is the legal and only corporate body; the new organization is a bald usurpation of the franchises of the State, and its acts, unless ratified by the legislature, are simply void. (*Decorah v. Bullis*, 25 Iowa, 12.)

Thus we perceive the suggestion that the new organization destroyed or superseded the old corporation to be unfounded. Not only so, but the foregoing observations answer the further suggestion that the creditor should cause a writ of mandamus to

be issued and directed to the officers who are acting under the new town organization.

The way is thus cleared to the immediate question which the court is called upon to decide, viz.: Whether it will appoint its marshal or some other proper person to assess and collect from the property of the municipality a tax sufficient to pay the plaintiff's debt.

For that debt he has the judgment of this court. Execution has been returned *nulla bona*. If the corporation had officers, a mandamus to require them to levy and collect the tax would be a remedy not only proper in itself, but one to which the judgment plaintiff is entitled as of right. This is settled law in this court, and it is not necessary to cite cases upon the subject decided by the supreme court of the United States. The corporation, however, has no officers, and we fear it is but too plain that the reason why the inhabitants do not elect officers under the Act of February 19, 1866, is that they cherish the delusion that they can defeat the rights of creditors, and by taking on a new organization escape old liabilities. Such notions of justice or corporate morality, if entertained, receive no countenance in the legislation or judicial decisions in Missouri or elsewhere. (*Lindell v. Burton*, 6 Mo. 371; [1865] Rev. Stats. 1865, p. 244; *Butz v. Muscatine*, 8 Wall. 575, 581, 583, 584; *Bank v. Patton*, 1 Rob. (La.) 499; *Van Hoffman v. Quincy*, 4 Wall. 537.)

This court must protect and enforce the rights of its constitutional suitors. The sending of its marshal into an indebted municipality, armed with authority to levy and collect a tax, is the exercise of a delicate and extraordinary power, to be avoided whenever possible; but which it will use whenever judgment it renders cannot otherwise be enforced. (*Riggs v. Johnson County*, 6 Wall. 166, 198; *Lansing v. Treasurer etc.* 9 Am. Law Reg. N. S. 415; *Same Case*, *post.*)

Were there any municipal officers *in esse*, the court certainly would not, in the first instance, appoint its marshal, but would issue its command to them.

Under the peculiar circumstances of this case, which is without a precedent, there seems to be no remedy to the plaintiff but to make the order he asks.

Anxious, however, to avoid, if may be, the carrying of this

order into effect, and to allow the corporation time to elect officers and itself to levy and collect the tax, the execution of the order will be suspended for the space of three months, and the right reserved to suspend it longer if a showing be made to the court or any of its judges, that an election of municipal officers, as provided by the law and charter, has been duly held, and that the proper body has levied, and is proceeding according to law, to collect the taxes necessary to satisfy the plaintiff's judgment.

TREAT, J., and KREKEL, J., concur.

Ordered accordingly.

[NOTE.—At common law a municipal corporation, it is said, may be dissolved (1), by act of parliament; (2), by the loss of an integral part; (3), by surrender of the corporate franchises to the crown; and (4), by forfeiture of the charter for abuse of its franchises, judicially determined. These modes of dissolution, except the first, are believed by the reporter to be inapplicable to our American municipal corporations, constituted for public [189] purposes, by legislative act. The existence of a corporation does not depend upon officers, and hence there is no such thing as dissolution by the loss of an integral part. Of course a public corporation cannot abandon or surrender at will its corporate functions or life. The doctrine of dissolution by forfeiture for misconduct is familiar in its relation to private corporations, but it cannot properly, it would seem, apply to municipal corporations as here constituted. See Willcock on Mun. Corp. ch. 7, which contains an interesting examination of English cases down to that time on the subject. This author doubts whether there can be an actual and total dissolution by loss of an integral part, or by surrender. (But see 2 Kyd on Corp. ch. 5; Glover on Corp. ch. 20; *Rex v. Passmore*, 3 Term R. 241; *Grant Corp.* 305 n., and Mr. Justice Campbell's learned opinion in *Bacon v. Robertson*, 18 How. 420; *People v. Wren*, 4 Scam. 275; *Smith v. Seaber*, 8 Desaus. 557.) That mere failure to elect officers will not dissolve while the capacity to elect remains. (See same authorities; also *Colchester v. Seaber*, 3 Burr. 1866; *Colchester v. Brooke*, 7 Q. B. 383; *Muscatine etc. v. Funck*, 18 Iowa, 469; *Com. v. Cullen*, 1 Har. (Pa.) 133; *President etc. v. Thompson*, 20 Ill. 197; *contra*, *Lee v. Hernandez*, 10 Tex. 137, but *quere*.)

As respects dissolution by appeal, the rights of creditors of a municipal corporation are protected from invasion by the constitution of the United States. (See *Lansing v. Treasurer etc.* *post*; *Butz v. Muscatine*, 8 Wall. 575; *Gelpcke v. Dubuque*, 1 Wall. 175; *State v. Cox*, 6 Ind. 403; *Thompson v. Lee & Co.* 3 Wall. 327; *Soutter v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *Blake v. Railroad Co.* 89 N. H. 435; compare *Mumma v. Potomac Com.* 8 Peters, 281.) *Contra*, *Port Gibson v. Moore*, 13 Smedes & M. 157, where the court seems to have overlooked the constitutional provision protecting creditors, and the case conflicts with those above cited.]

Mandamus to Compel Municipal Corporation to Collect Tax, and Appointment of Marshal Therefor.—Denied, *Rees v. Watertown*, 19 Wall. 118.

PARTRIDGE v. LIFE INSURANCE COMPANY.

LIFE INSURANCE—COMPENSATION OF AGENTS—USAGE.—In an action by the former local agent of a foreign life insurance company against the company to recover the commuted value of commissions on the renewal of policies after the plaintiff was discharged, it appeared that the contract fixing the plaintiff's compensation was contained in a letter from the secretary of the company, to him, which stated: "You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent." It was held, in substance, that the plaintiff could not show a local usage among other companies, not including the defendant's company, to pay the commuted value of premiums during the whole existence of the policy, should the agent who procured the policy be discharged, or cease to act for the company.

[140] Before DILLON, J., TREAT, J., and KREKEL, J.

PER CURIAM.—The plaintiff had been the local agent in St. Louis, of the defendant, a foreign insurance company, and in this action sought to recover commissions, or commuted value thereof, for renewals of policies after he ceased to be the agent. The plaintiff served as such agent, under a letter from the company, to him, which stated: "Your status is this: You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent." To this the plaintiff assented. *Held*, on the trial: 1st. That the whole sentence was to be taken together, and that the plaintiff could not introduce the parol testimony of insurance men or agents, to show that the words "working up a business for yourself" (separating them from the rest of the connected sentence) had a peculiar meaning, and meant that he should be entitled to continuing, or future commissions after he had ceased to be agent, and of which he could not be deprived by being discharged from the service of the company. 2d. That while the plaintiff might show by parol what were the highest commissions, or best terms paid by the defendant to any of its agents with like duties as the plaintiff, he could not show that there was a *usage* among other life insurance companies in St. Louis, or doing business there, to pay commissions for renewals, or the commuted value thereof, during the whole existence of the policy, and after the agent ceased to act for the company. Such usage on the part of other companies being regarded as inconsistent with the special contract, which was, that the plaintiff was to have the highest

commissions paid by the defendant, and not the highest paid by others, and besides, such usage was not alleged or shown to be known to the defendant, which was a foreign corporation.

[141] *Harding & Thayer*, for the Plaintiff.

Eno, Cline, Jamison & Day, for the Defendant.

[NOTE.—Function of usage or custom in the interpretation of contracts explained. (*Barnard v. Kellogg*, 10 Wall. 883.) Never admissible to contradict or eat away an express contract. (*Stagg v. Insurance Company*, 10 Wall. 589.)

Judgment Affirmed on appeal, 15 Wall. 573.

DARBY'S TRUSTEES v. BOATMAN'S SAVINGS INSTITUTION.

BANKRUPTCY—LOANS TO INSOLVENTS.—The bankrupt act does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such loan, provided it be made *bona fide* and without any intent, or participation in any intent, to defraud creditors or defeat the bankrupt act.

Id.—**ADVANCES UPON SECURITY.**—Advances made in good faith to an indebted person to enable him to carry on his business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debt he creates, and the security he gives.

Id.—**USURIOUS LOANS.**—Where the charter of a bank prohibited it from taking greater than a specified rate of interest, but was silent as to the effect or penalty if more than the charter rate be taken, it was held that if an illegal rate be contracted for, the effect was not to render the whole note void, but only the excess beyond the legal rate, and that, at all events, if such a note be voluntarily paid, neither the borrower nor his assignee in bankruptcy can recover back the principal sum, or anything more than the excess beyond the legal rate of interest.

Id.—**REMEDY—EQUITY JURISDICTION.**—Equity will entertain a bill to recover such excess: the remedy is not exclusively at law.

Before DILLON, J., TREAT, J., and KREKEL, J.

THE complainants are trustees under the forty-third section of the bankrupt act, of John F. Darby, who was decreed a bankrupt on the 2d day of July, 1869.

After stating that Darby was decreed a bankrupt, and Park and Tiffany appointed his trustees, the bill avers that [142] Darby had for a long time prior to October, 1868, been doing an unprofitable business as a private banker, which defendant well

knew. That being largely indebted, he had been in the constant habit of making and issuing his promissory and negotiable notes in sums of from \$2,000 to \$5,000, bearing interest on their face; that they were constantly placed in the hands of street brokers and sold or shaved at a heavy discount thereon for a commission paid by Darby, which defendant knew. That Darby's real estate was all fully encumbered, and the encumbrances recorded, and of which defendants had notice. That on or about the 14th of October, 1868, defendants, knowing that Darby was acting in contemplation of *insolvency*, and that his course of business must inevitably render him bankrupt, conspiring together for their own benefit, and intending to enrich themselves at the expense of Darby and his creditors, and conspiring with Darby himself to "gain and maintain for him an unreal, false, and fictitious credit," and in fraud of his creditors, and designing, etc., to defeat the bankrupt law, did, being limited by its charter to eight per cent, agree to lend, and did lend to said Darby \$128,137.50, and receive therefor his note for \$135,000, dated 14th October, 1868, bearing ten per cent interest after maturity, and payable six months after date; on the face of this note was written, "One hundred and fifty, seven per cent jail bonds, \$1,000 each, as collateral to this note, are deposited in the Bank of America, New York," and on the back of it were certain memoranda of payments beginning the 5th of March, 1869, and ending June 3d, 1869, extinguishing the note and ten per cent. That the note was utterly void and fraudulent. When it became due defendant fraudulently extended it, knowing, etc., that they allowed him to sell and dispose of the said bonds within four months of his bankruptcy, knowing, etc., and received the proceeds thereof from him in payment of said note.

That the defendant well knowing, etc., refused to discount certain other notes of Darby indorsed by responsible persons, but ^[148] did purchase from street brokers the following, namely: Two notes, each indorsed by Marshall Brotherton, dated 21st September, 1868, and at five and six months respectively, each for \$5,000; three notes dated about 3d, 7th, and 27th of November, 1868, payable three months, sixty days, and six months after date, for \$5,000 each, indorsed by S. Knox. Defendant

knew that these notes were indorsed for the mere accommodation of Darby, and sold by note brokers at usurious and illegal rates, as high as from twelve to fifteen per cent, and contrary to their charter. That all such notes were void. That afterwards, having reasonable cause to believe Darby to be acting in contemplation of bankruptcy, defendants received the amount of said notes at maturity from said Darby. Defendants also bought another note, dated 6th February, 1869, at sixty days, for \$5,000, indorsed by Brotherton, and received the amount at maturity. Plaintiffs charge that defendants had reasonable cause to believe at the time of the negotiation of said notes that Darby was insolvent and acting in contemplation of insolvency; that the course and tendency of his business must lead to ruin; that the mode of selling his paper was not the usual one; that all his real estate was largely encumbered. That notes taken from Darby were void *ab initio*. That for the purpose of acquiring a fictitious credit Darby bid for the jail bonds of St. Louis county more than their market value; that at the time he had no funds, etc., and applied to the National Bank of the State of Missouri to loan him the money; the bank lent him the money. Darby lost large sums by the purchase, and was indebted therefor to the bank, and being unable to pay, applied to the defendants to lend him \$128,137.50 and to discount his note for \$135,000, to enable him to discharge in part, at least, his said indebtedness to the bank, and not for the purpose of his ordinary and legitimate business; all of which defendant well knew, and conspired with Darby to maintain for him his said fictitious credit, and to defeat the provisions of said act, and discounted the said note in furtherance of said plan. Said ^[144] bonds had never been in Darby's possession, but had been delivered to the bank; purchasing them had been noised about in the public prints, with the intent, etc., but had been bought by said Darby and paid for by said National Bank. That they "never were in good faith absolutely delivered to defendant, but that defendants upon the delivery of the bonds, made an arrangement with Darby that he might at any time sell the same, and dispose thereof before or after the maturity of the note for \$135,000, applying proceeds to the payment of the note; permitted Darby to deal with the bonds and coupons as his own property, and

not as held and pledged to defendants; and allowed him to be considered as the absolute owner, thereby giving in a false and fictitious credit, "necessarily productive of loss to Darby and his creditors," in fraud of the bankrupt act. All of which was done to prevent the property of Darby from being distributed under the bankrupt law. Wherefore plaintiff "ought in equity and in accordance with the terms of said act, to recover of said defendants all the said sums of money to them paid by the said Darby in fraud of said act and in payment of said fraudulent and void notes," and the prayer is for a decree to that end.

A general demurrer to the bill is filed, on which the questions decided arise.

Glover & Shepley, and Samuel Knox, for Complainant.

Thos. T. Gantt, Lackland, Martin & Lackland, for Defendant.

DILLON, *Circuit Judge*.—This is a bill in equity by the trustees in bankruptcy of John F. Darby, to recover from the defendants the sum of \$165,000, to which, for the reasons stated in the bill, the trustees claim to be entitled.

The facts set forth in the bill are numerous, and several transactions are detailed. The questions presented may be best treated by first stating some principles of law which underlie this controversy, and then by applying these principles to the case made by the bill.

[145] There is no provision of the bankrupt law which prohibits a person from loaning money to or discounting at *legal* rates, the note of a person whom he has reason to believe to be insolvent, provided the former makes such a loan or discount *bona fide*, and without any intent or participation in any intent or scheme to defraud creditors or defeat the bankrupt act. As such loans may be lawfully made, so security therefor may be lawfully taken. The distinction is here: the act under the circumstances stated in the bill does prohibit a debtor from giving, or a creditor from receiving, security for a *pre-existing* debt, thereby obtaining a preference which it is one of the chief purposes of the law to prevent. So the bankrupt act prohibits an insolvent person from making any conveyance or disposition of his property to those not creditors which shall work a fraud

upon creditors and upon the act. (§§ 14, 35, 39; *Bean v. Brookmire*, ante, 24.) The cardinal idea is that all the property of a person in Darby's situation ought to be appropriated for the equal and indiscriminating benefit of all his creditors; and therefore he can neither fraudulently diminish the amount of his assets, nor give one creditor or class a preference over others, since such preferences are stamped by the inexorable policy of the enactment as void.

But an insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money and give *at the time* security therefor, provided always the transaction be free from fraud in fact, and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act. This is manifestly right since the power to raise ready money may save the party from bankruptcy and ruin, and since his creditors are not injured nor his estate impaired, because he gets a present equivalent for the debt he creates and the security he gives.

[146] To this effect are all the authorities. (*Deacon Bank*. 68, 69, 75, and cases cited; *Shelf. Bank*. 146; *Hilliard Bank*. ch. 10, p. 333, § 10; *Hutten & Crutwell*, 1 El. & B. 15; *Harris v. Rickett*, 4 Hurl. & N. 1; *Bruteston v. Cooke*, 6 El. & B. 206; *Lee v. Hart*, 34 Eng. L. & Eq. 569; *Ex parte Shouse*, *Crabbe*, 482; *Bell v. Simpson*, 2 Hurl. & N. 410; *Hunt v. Mortimer*, 10 Barn. & C. 44; *Wadsworth v. Tyler*, 2 Bank. Reg. 101; Bankrupt Act, § 14, second proviso; Bankrupt Act, § 20; *In re Wynne*, 9 Am. Law Reg. (N. S.) 627.)

If, therefore, the advances made under the circumstances set forth by the defendants contemporaneously with the receiving of the securities had been at legal or authorized rates, they would have been valid; and the transaction not being forbidden by the bankrupt act, the security received could be enforced by law, and if so then Darby could lawfully pay such advances out of the proceeds of the securities which he had pledged. What the law will compel one to do may be legally done by him without such compulsion.

The bill does not charge that the money was borrowed by Darby fraudulently to put it beyond the reach of creditors, but to enable him to pay a debt to the National Bank of the State of Missouri, from which he had originally borrowed the money to pay for the jail bonds, and which then had them in pledge; and there is nothing shown to invalidate the debt or security to the National Bank, and the effect of the loan made by the defendants was simply to substitute them in the place of that bank, and did not work any fraud upon the creditors of Darby.

The intent to defeat the bankrupt act charged in the bill is based upon the assumption that the loans and advances to Darby are void because made at illegal rates, and not upon the ground that Darby intended to conceal his property or to prefer or otherwise defraud his creditors. Having thus settled that if the loan had been at authorized rates it would not under the facts charged have been in violation of the bankrupt act, we next proceed to inquire into the effect of receiving and taking interest in excess of such rates.

[147] The complainant's fundamental proposition is, that although the defendant actually paid Darby \$128,137.50 in cash for the note of \$135,000, secured by a concurrent pledge of the jail bonds as collateral, yet since the loan was made at more than eight per cent, the transaction was, to use the clear language of the complainant's counsel, "without any authority in the charter, was *ultra vires* and void, created no debt in favor of the defendants, imposed no legal liability on Darby, and hence no payments could be legally made upon it; if made, were without consideration, and in fraud of the right of creditors."

The charter of the defendant granted by the State of Missouri contains this provision: "The said institution shall be authorized to loan the money deposited with her at any rate of interest not exceeding eight per cent per annum, any law to the contrary notwithstanding." (§ 14.)

The charter is silent respecting the effect or penalty if more than the prescribed rate of interest be taken.

By the general usury laws of the State, money may be loaned at a rate not exceeding ten per cent, but if the law is violated the contract is not wholly void, as the plaintiff can recover for himself the principal sum; and the defendant is also compelled

to pay legal interest for the use of the school fund, and usurious interest voluntarily paid is not under this statute recoverable back by the borrower from the usurer. (*Ransom v. Hays*, 39 Mo. 445.)

The complainant's counsel disclaim all rights grounded upon the general usury laws, since the bill is not, as they say, intended to enforce them, and is not one to recover back usury. They plant themselves wholly upon the provision in the charter above mentioned restricting the defendants to interest not exceeding the specified rate; and the argument is, as above stated, that if this provision be violated the loan is *ultra vires* and void. The rate of some of the loans set out in the bill exceeded not only eight but ten per cent, and the question is, what is the effect of this violation of the law?

[148] In our opinion the defendant, if more than ten per cent be taken, is within the operation of the usury laws of the State, if the debtor chooses to plead them. (Rev. Stats. 1865, 83, § 4, and see *State etc. v. Boat. Sav. Inst. quo warranto case*, MS., Sup. Ct. of Mo.) If so, the effect is that under those laws it would lose its right to recover any but the principal sum, but the debt having been paid, the usurious interest could not have been recovered back by Darby had he not been put in bankruptcy, nor can it in this State be recovered by his assignees, much less could he or they recover back the principal sum. (*Ransom v. Hays*, 39 Mo. 445.)

But suppose that the *charter alone* applies to the transaction, what is the effect upon it? The charter itself is silent on this subject. Upon the best consideration we have been able to give to the matter, our conclusion is that the effect of taking more than the specified rate of interest on loans is not to avoid the whole note—to nullify the transaction—to forfeit the entire debt or sum loaned, but only the excess over the charter limit, so that the note, as to the principal sum at least, if not the principal sum and eight per cent interest was valid, the security taken therefor valid, and so could be enforced, and the bonds sold against Darby's will, and hence could be lawfully sold by him, with defendant's consent, and the proceeds paid on the debt they were pledged to secure.

This is a case where the line which separates that which is

authorized from that which is prohibited, is plainly drawn, and the division easily made, and hence there is no necessity, in order to enforce the prohibition or to secure its policy, to sacrifice the good that the bad may be destroyed.

In contracts usurious under the State law the same division is constantly made; the plaintiff recovers that which is not prohibited, and loses his right to that which is.

If we look at the legislative history of banking and similar corporations in the State, we find no such severe policy declared as that, if more than a given rate of interest be taken, ^[149] the whole sum loaned shall be forfeited, but quite the contrary.

The power of the defendant to make loans is expressly conferred, and therefore exists; the limitation is only as to the rate. Up to the limitation line all is good; beyond that, bad.

And such is the general, though not quite uniform, doctrine of the authorities. (*Harris v. Runnells*, 12 How. 78; *Bank of the United States v. Fleckner*, 8 Wheat. 338; to which the court "deliberately adhered" in the *Bank of the United States v. Waggoner et als.* 9 Peters, 378; *Farmers' Bank v. Burchard*, 35 Vt. 346, and cases cited; *Bank v. Nolan*, 7 How. (Miss.) 508; *Rock River Bank v. Sherwood*, 10 Wis. 220; *Ex parte Moore*, 1 Bank. Reg. 123; *Lyon v. State Bank*, 1 Stewt. 468; *Bank v. Archer*, 8 Smedes & M. 151; *McLean v. Lafayette Bank*, 3 McLean, 587, 598, 609, 614.) This last case contains a highly interesting discussion of the subject by Judge McLean, whose views have our approval. Before leaving this point it should be observed that we have not overlooked the case of the *Bank of the United States v. Owens*, 2 Peters, 557, but upon examination of the other cases referred to in the same court, it is quite clear that its doctrine is modified, but if not, it has no rightful application to a case where, as in the one now under consideration, the illegal contract is not, as in that case sought to be enforced, but where having been performed, the money voluntarily paid under it is sought to be recovered back.

If, as shown above, the loan was not a fraud in fact or upon the bankrupt law, Darby's trustees have no more right to recover back the money which Darby voluntarily paid, because paid in violation of the charter, than Darby himself would have had if he were not in bankruptcy.

Suppose, for the argument, however, that the note was void because the charter rate was exceeded, does it then follow that the bill to recover back the whole sum received will lie? This bill is in equity, and the rule is well settled that under [150] statutes which declared contracts affected with usury utterly null and void, equity would only relieve against them on condition that the borrower should tender or pay the sum actually lent, and lawful interest; and if paid, neither at law nor in equity could he recover back anything more than the excess beyond principal and lawful interest, unless the action be expressly given. (1 Story Eq. §§ 301, 302; *Spain v. Hamilton's Administrator*, 1 Wall. 604.)

The analogy is good here, and Darby having received the defendant's money and paid it, there is no equity whatever to recover back any part of it except the excess beyond the principal and the eight per cent interest. In equity, if not at law, there was a debt for the amount borrowed, and a right to the security of the bonds pledged. The debt was paid out of the securities, and if the pledging of the securities was valid as we have seen it was, the defendant had the right to make its debt out of the securities, notwithstanding its officers knew when they received payment that Darby was insolvent. So that the question of the defendant's liability turns upon the point first discussed, to wit, whether the bankrupt act was violated by the loans to Darby, and the taking of the securities from him by the defendant under the circumstances set forth in the bill, and that question we have felt constrained to resolve against the complainants.

Counsel concede that the other transactions mentioned in the bill involve the same principles, and it is unnecessary to notice them specially.

In view of the charter restriction and its policy, the parties were not *in pari delicto*, and as to the excess above the principal and eight per cent interest we think, under the facts charged in the bill, there is liability, at least to some extent, on the part of the defendant, and the authorities show that relief may, in proper cases, be had in equity, and that the remedy is not exclusively at law. Indeed, the original remedy in such cases was given in equity. (Fonbl. Eq. book 1, ch. 4, § 7; Story's Eq.

§ 302; Story's Eq. ^[151] §§ 64, 81; *Browning v. Morris*, Cowp. 790; *Mare v. Sanford*, 1 Giff. 288, 295; *Atkinson v. Derby*, 6 Hurl. & N. 778; S. C. 7 Hurl. & N. 934.)

As to the \$135,000 transaction, certainly this liability is not affected by reason of the non-liability under the usury statute of the State for usurious interest voluntarily paid, for that statute does not apply to this transaction.

For the reasons above stated, the demurrer to the bill must be overruled, and the bill may be retained to determine the liability of the defendant in respect to the illegal interest received.

TREAT, J., and KREKEL, J., concur.

Demurrer overruled.

Note. On Appeal the supreme court affirmed the principles of the foregoing opinion, and the decree on all points, except that it directed "the circuit court to ascertain the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to cover that sum." — *Tiffany v. Boatman's Institution*, 18 Wall. 375; compare 91 U. S. 35; 22 Wall. 170.

Loans on Security in Good Faith to Insolvents not prohibited by the Bankrupt Act. — Followed, *Babbitt v. Walbrun*, 6 Bank. Reg. 364; *In re Union Pacific R. R. Co.* 10 Bank. Reg. 185; *Bean v. Brookmire*, post, 154; *Gaffney v. Signaigo*, post, 160; *Darby v. Lucas*, post, 170; *In re Coulter*, 2 Sawy. 45; S. C. 5 Bank. Reg. 66. Cited, *Crocker v. Chetopa Nat. Bk.* 4 Dill. 861.

Jurisdiction of Law and Equity Courts in cases of fraud concurrent. — Followed, *Bean v. Brookmire*, post, 155.

Contracts Respecting Interest Void as to Excess over statutory rate. — Followed, *Lewis v. Clarendon*, 5 Dill. 339. Explained, *In re Pitcock*, 2 Sawy. 425; S. C. 8 Bank. Reg. 425.

BEAN, ASSIGNEE, ETC., v. BROOKMIRE & RANKIN.

BANKRUPTCY — RIGHTS WHICH PASS TO ASSIGNEE. — The assignee in bankruptcy may recover money fraudulently paid by the bankrupt to the defendants in order to obtain their signature to a composition agreement.

Id. — JURISDICTION IN EQUITY. — Equity will entertain such a bill by the assignee, although he might have maintained an action at law.

Before DILLON, J., and KREKEL, J.

AFTER the decision of this court in the cause reported above (*ante*, p. 24) the assignee brought the present bill, in the district court for the eastern district of Missouri, to recover money alleged

to have been fraudulently paid by the bankrupt to the defendants. The district court sustained the demurrer to the bill on the ground that no recovery could be had in equity, and that the remedy was exclusively at law. The assignee ^[153] appeals. The necessary facts appear in the opinion of the court.

Edmund T. Allen, for the Assignee.

Stewart & Slayback, for the Respondents.

KREKEL, *District Judge*.—This is a bill by the assignee of the bankrupt to recover of defendants fourteen hundred and thirty-six dollars, alleged to have been fraudulently paid by Kintzing, the bankrupt, to Brookmire & Rankin, the defendants, in order to obtain their consent and signature to a composition deed entered into by the creditors of Kintzing & Co., prior to the adjudication in bankruptcy against the said Charles S. Kintzing.

The defendants filed their demurrer, and for cause assign that complainant has no interest in the subject-matter of the bill, and want of equity.

The court below sustained the demurrer, on the ground that full and complete remedy exists at law, and that the action does not lie in equity.

The bill alleges that Charles S. Kintzing and Malcolm A. Lindsley were merchants doing business under the name and style of Charles S. Kintzing & Co.; and becoming insolvent, on the 15th day of February, 1859, applied to their creditors, among them defendants Brookmire & Rankin, for a compromise, and on the same day entered into a composition agreement with them, agreeing on their part to pay seventy cents on the dollar, in six, twelve, and eighteen months; that one of the conditions of said compromise was that the same should not be binding unless signed by all the creditors; that afterwards, on the 27th day of February, 1869, the said partnership of Charles S. Kintzing & Co. was dissolved by the withdrawal of Lindsley, who at the time was largely indebted to the firm. The bill charges that the consent and signature of said Brookmire & Rankin were obtained by Charles S. Kintzing, the bankrupt, conniving with the said Brookmire & ^[153] Rankin to deceive

and defraud the creditors of said Kintzing & Co., who had *bona fide* entered into this compromise; and that said bankrupt fraudulently paid, and the said Brookmire & Rankin, well knowing the deception and fraud to be practiced, and participating therein, received the sum of fourteen hundred and thirty-six dollars, now sought to be recovered.

In support of the first ground of demurrer, that the complainant has no interest in the subject-matter of the bill, it is argued that no provision of the bankrupt law, either directly or by implication, passes any title or interest in the subject-matter of this suit to the assignee, and the fourteenth and thirty-fifth sections of the act are commented on by counsel. The former sections, among other provisions, has the following:—

“That the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt; . . . and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in the assignee, . . . all rights in equity, choses in action. . . . And all his rights of action for property or estate, real or personal, shall in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee.”

The terms used in the foregoing extracts have a definite signification, and embrace all rights and estate a man may own or possess, without limitation or qualification, and seem to have been used on account of their well ascertained meaning, both in law and in common acceptance. The provisions cited, thus defined, are by the court deemed sufficient to vest in the assignee whatever of interest the bankrupt had in the premises.

It is next said that the bankrupt had no interest which could pass to his assignee; that the payment made to Brookmire & Rankin by the bankrupt was that of a just debt, which they had a right to receive. It is true that if such a payment had been made and received *bona fide*, and not attacked ^[154] under the four months clause of the thirty-fifth section, no recovery could have been had, as was decided in this court by Justice Miller in a case against these defendants at a former term. (*Ante*, p. 24.) Can a payment made and accepted for the purpose, and with the intent to deceive and defraud unsuspecting

creditors, as charged in the bill, be said to be made *bona fide*? Numerous authorities might be cited establishing that a compromise entered into under such circumstances avoids the composition deed, and that the creditors are not bound thereby; nor are authorities wanting to show that the law will not allow the enforcement of any obligations given to secure a preference. (*O'Shea v. Collier etc. Co.* 42 Mo. 397.)

It is true the courts were slow in coming to the conclusion to interfere between the parties to the fraud, even when invoked to do so. They commenced, however, by permitting inquiry into usurious transactions, and upon close examination did not fail to see that the relations in which the lender and borrower stood to each other differed. The case of *Darby's Trustees v. The Boatman's Saving Institution*, decided at this term, recognizes this distinction. (*Ante*, p. 141.)

The reasons on which this class of cases proceeds are of easy application in the cause now before the court. The bankrupt was seeking to compromise with his creditors, all of whom were to join in order to bind them. Brookmire & Rankin refused unless they could obtain a preference, and having obtained it, pretended to come into the composition with other creditors on equal terms when they had in fact, by their preference, abstracted a share of the property to which the honest, confiding creditors looked for the ultimate satisfaction of their claims. Under such circumstances the courts have finally held it to be the better policy to allow the debtor, though a participant in the fraud, to recover the amount paid. (*Atkinson v. Derby*, 6 Hurl. & N. 778; *Same Case*, 7 Hurl. & N. 934; *Mare v. Sanford*, 1 Giff. 295.)

Such a recovery does not, however, interfere with the right [155] of the creditors to seek satisfaction from those who have deceived and defrauded them.

A more serious question arises, and one about which the courts have differed, whether a recovery can be had in equity in a case such as is before us, the complainant having, as held by the court below, a complete remedy at law. Courts of chancery seem originally to have had exclusive jurisdiction of fraud, oppression, and deceit, but in time law courts also took cognizance thereof. While it may be admitted that the complain-

ant might maintain an action at law, it does not therefore follow that this court, as a court of equity, is ousted of its jurisdiction. (Story's Equity Jur. 1, § 64 i, (tenth edition); *Darby's Trustees v. Boatman's Saving Institution*, *supra*, and authorities cited.) The jurisdiction of law and equity in cases of fraud of this character is concurrent, at all events it exists in equity. The acts charged are oppressive and wrongful as against the debtor, and operate as a fraud upon the other creditors, and upon the bankrupt act.

The case being before us on the equity side of the court, and having, under the views entertained, power to grant the relief sought, we will reverse the order of the court below, and remand the case for further proceedings therein.

DILLON, C. J., concurred.

Reversed.

Note. Assignees in Bankruptcy are Authorized to Sue for and recover money or property fraudulently disposed of by bankrupt.—Cited, *Bean v. Amsinck*, 10 Blatchf. 370, 374.

KINSING'S ASSIGNEE v. BARTHOLEW ET AL.

BANKRUPTCY—CONSTRUCTION AND EFFECT OF COMPOSITION AGREEMENTS.—A provision in a composition agreement that "it is not to be binding on any one unless agreed to and signed by *all* of the creditors," applies to secured as well as unsecured creditors; and where this provision is not waived, and the composition agreement is not signed by all, it does not have the effect to relieve the debtor from a state of *insolvency* within the meaning of the bankrupt act.

[156] Before DILLON, J., and KREKEL, J.

WRIT of error to the district court for the eastern district of Missouri.

The plaintiff is the assignee in bankruptcy of Charles S. Kinsing, who was a merchant, and the defendants were his bankers. This was an action commenced in the district court under the thirty-fifth section of the bankrupt act, to recover the amount of a promissory note paid to the defendants by the bankrupt shortly before the commencement of the proceedings in bankruptcy. The note thus paid was made by Kinsing &

Co., January 15, 1869, was indorsed by one Wilcox, and fell due in sixty days, at which time the indorser waived notice and protest. After the note was made, and before it became due, to wit, February 15, 1869, the makers (Kinsing & Co.) entered into a composition agreement with their creditors to pay seventy cents on the dollar, at six, twelve, and eighteen months, without interest. (See *Bean v. Brookmire*, ante, p. 151.) The agreement was in the usual form of such instruments, and contained this provision: "*This agreement is not to be binding on any one unless agreed to and signed by all of the creditors of the firm.*" This agreement was known to, but was never signed by, the defendants. On the 9th day of August, 1869, Kinsing & Co. paid the above-mentioned note to the defendants; on the 16th day of August, 1869, the notes of Kinsing & Co., under the compromise agreement, fell due and were not paid; on the 17th day of September, 1869, Kinsing & Co. were thrown into bankruptcy; and, in point of fact, were insolvent for months before.

The district court decided in favor of the defendants on the ground that the composition agreement was binding, and had the effect to relieve Kinsing & Co. from the insolvent condition in which they were when that instrument was ^[157] made. To reverse this judgment the assignee prosecutes this writ of error.

E. T. Allen, for the Assignee.

R. H. Spencer, for the Defendants.

DILLON, *Circuit Judge*. — This is an action under the thirty-fifth section of the bankrupt act to recover back money paid, as alleged, to the defendants, by way of illegal preference. The court below, in its declaration of law, asserted the composition agreement to be binding, and was of the opinion that the extension it provided for must be "considered as relieving the debtors from a state of immediate insolvency." Aside from the compromise agreement it is clear that the payment to the defendants would be within the prohibition of the act.

The agreement contained a provision that it "is not to be binding on any one unless it shall be agreed to and signed by

all of the creditors of the firm." Defendants were creditors of the firm and did not sign it or agree to it.

We hold that his agreement applies to "*all* the creditors of the firm," secured as well as unsecured, and hence, as the defendants did not assent to or sign the same, it was not binding on any of the creditors. (See *Cobleigh v. Pierce*, 32 Vt. 78; *Paulin v. Kaigler*, 3 Dutch. 512; *Sohier v. Loring*, 6 Cush. 537, 543; *Spooner v. Whiston*, 8 Moore, 580.)

The declaration of law, therefore, was in this respect erroneous.

If all the creditors signed except the defendants, and became parties to the agreement, knowing that the defendants had not signed it and would not, but notwithstanding this they entered upon and proceeded with the compromise, this might, it may be conceded, amount to a waiver of this clause of the contract, but the district court did not find or declare that there was any such waiver or any acquiescence, nor put its decision for the defendants upon this ground. (See *Montague* [188] on Comp. 39; *Montague* on App. 125; *Ex parte Shaw*, 1 Madd. 590; *Ex parte Kelner*, Buck. 164; *Ex parte Lowe*, 1 Gill & J. 81; Forsyth on Comp. Am. ed. 1845, 23.)

KREKEL, J., concurs.

Reversed.

GAFFNEY'S ASSIGNEE v. SIGNAIGO.

BANKRUPTCY—FRAUDULENT CONVEYANCE.—There is no provision of the bankrupt act which avoids a security otherwise valid, because it is taken in the form of an absolute deed instead of a mortgage.

LOANS TO INSOLVENTS ON SECURITY—VALIDITY OF.—A person who is insolvent may borrow money, and give a valid security therefor on his property, if no fraud in fact be intended, and no fraud on the bankrupt act be effected.

Before DILLON, J., and KREKEL, J.

THIS is an appeal from a decree of the district court for the eastern district of Missouri.

Gaffney made an absolute conveyance of certain property in the city of St. Louis to the defendant, and this is a bill by the

assignee of Gaffney to set aside this conveyance because the same was fraudulent, and in violation of the bankrupt act.

The answer admits the making of the conveyance, but denies the fraud, and sets up that the deed was executed to secure a sum of money advanced at the time by the defendant to Gaffney, and actually applied by the latter to the payment of judgments, taxes, and debts which were liens on the property, and certain other judgments rendered by justices of the peace, which could or will be made liens thereon. The answer claims to hold the property as security only, and prays, by way of cross bill, that the amount of advances made on the security of the deed be declared a lien on the property.

[159] The district court found that the deed was made as security only, ascertained the amount of the advances, and entered a decree in conformity with the prayer of the cross bill, from which the assignee appeals.

E. T. Allen, for the Assignee.

Lackland, Martin & Lackland, for the Defendant.

DILLON, *Circuit Judge*.—1. The fact is conclusively established that the money which the defendant loaned was applied to the payment of debts against Gaffney, which were either liens on the property, or could have been made so at any time, at the election of the creditors.

It is claimed by the assignee that an absolute conveyance, made for the purpose of securing a *bona fide* debt, though created at the time with a parol understanding between the parties that the land is to be reconveyed upon the payment of the debt and interest, is void against creditors, especially if the grantee is aware of the existence of other creditors, and knows or has reason to believe the grantor to be insolvent.

Such, however, is not the law, and the deed is valid as a security, and may be enforced as such, unless actually or constructively fraudulent. There is no provision of the bankrupt act which avoids a security otherwise valid, because taken in the form of an absolute deed instead of a mortgage. The fact that it is so taken may be a circumstance to show fraud, but alone does not establish it, and why it was thus taken has, in the case at bar, been satisfactorily explained.

The case is unlike *Lukins v. Aird*, 6 Wall. 79, where a valuable right—that of possession—was secretly reserved to the failing debtor, contrary to the terms of the deed; here was no absolute sale in fact, and no attempt by the debtor to reserve a right at the expense of his creditors.

2. It is also claimed by the assignee that Gaffney, being insolvent at the time the deed was made, and the defendant [100] having reasonable cause to believe this to be the fact, that the making of any disposition of his property was fraudulent because in contravention of the thirty-fifth section of the bankrupt act.

But a person who is believed to be insolvent may borrow money *bona fide*, and give a valid security therefor on his property, no fraud in fact, or on the bankrupt act, being intended or effected. (*Darby's Trustees v. Boatman's Savings Institution*, ante, 141, and authorities cited.)

The court finds from the evidence in the case that the defendant had money to loan; that Gaffney, learning of this, applied to defendant's agents to borrow it to pay off liens and debts as above mentioned; that defendant, on the agents' recommendation, at last consented to make the loan; that the agents advised the security to be taken by way of absolute deed, which was not done secretly, and that the whole sum borrowed (except a few dollars excluded from the decree by the district court) was by the defendant's agents actually paid over to the creditors of Gaffney, whose liens were extinguished and whose judgments were satisfied on the record.

Certain it is, therefore, that no fraud was wrought by the transaction upon the creditors of Gaffney; and equally clear is it upon the evidence that no fraud was meditated by the defendant. There is no evidence that he ever claimed to own the property absolutely. Gaffney was allowed to remain in possession, and the theory that the conveyance was taken in this way to deceive creditors, or to defraud them, has no support in the evidence.

KREKEL, J., concurs.

Decree affirmed.

[161] LINKMAN v. WILCOX.

BANKRUPTCY—ILLEGAL PREFERENCE—INTENT.—A judgment creditor who levies upon the entire stock in trade of his debtor, with knowledge or reasonable cause to believe that he is insolvent, is not entitled to the proceeds of the sale in the hands of the sheriff, as against the assignee in bankruptcy; the requisite intent on the part of such a creditor to defeat the bankrupt act will, under such circumstances, be inferred.

Before DILLON, J., and KREKEL, J.

ERROR to the district court for the eastern district of Missouri.

Winter owed Linkman \$2,300, and interest, to recover which the latter commenced suit in July, 1870, and obtained judgment November 22, on which execution issued November 29, 1870, and was levied by the sheriff on Winter's stock of goods. On the next day after the levy Winter filed his petition in bankruptcy to be adjudicated a bankrupt, and was on the 3d day of December, 1870, adjudicated a bankrupt. On the 15th day of December the sheriff sold the stock of goods levied on, and there arose from the sale the sum of \$1,583.05. Linkman filed a petition in the district court of the United States for the eastern district of Missouri, asking for an order upon the sheriff that the proceeds of the sale be paid to him. The assignee in bankruptcy answers, and insists that the money be paid to him for the benefit of the estate of the bankrupt.

The evidence shows that at the time judgment was obtained by Linkman against Winter the latter was insolvent. It also shows that Linkman knew, or had reasonable cause to believe, that Winter was insolvent, and that Winter was aware of his own insolvency. Winter did not procure suit to be brought, and although he had no real defense to Linkman's action, he employed an attorney, who filed an answer and defended the action as best he could, to gain time; but [162] the only defense made related to the interest claimed, which being waived by the plaintiff the court gave him judgment.

There was no contrivance or collusion between Linkman and Winter to give the former the preference; on the contrary, the debtor's desire seemed to be to prevent the judgment and execution.

And the question is, whether, under the circumstances, the

judgment creditor or the assignee in bankruptcy is entitled to the proceeds of the sale under the execution.

The district court decided in favor of the assignee. A bill of exceptions was taken, and the cause is here on a writ of error prosecuted by the judgment creditor. No question is made as to the mode of reviewing the decision below.

Finkelnburg & Rossieur, for Linkman.

Fisher & Rowell, for the Assignee.

DILLON, *Circuit Judge*. — Before the bankrupt act was passed the law allowed a debtor to prefer a creditor, and it permitted the latter to secure a preference by contract or by suit. To prevent this is one of the main purposes of the bankrupt act. Hence the many provisions in the enactment leveled against preferences, and intended to place all creditors, with few exceptions (§ 27), upon a plane of perfect equality, “without any priority or preference whatever.” This cardinal purpose of the legislation in question must never be overlooked in construing the special provisions of the act.

Assuming the facts of the case to be as above stated, it is the opinion of the court that to hold the judgment creditor to be entitled to the money in the hands of the sheriff would be to give him a preference over other creditors, under circumstances which contravene the purpose of the bankrupt law.

It is provided (§ 39) that any person who, being insolvent, shall procure or *suffer* his property to be taken on legal ^[163] process, with intent to give a preference to one or more of his creditors, or with intent to defeat or delay the operation of the bankrupt act, shall be deemed to have committed an act of bankruptcy, and the assignee may recover back the money, etc., paid, etc., contrary to the act.

In this case Winter did suffer his property to be taken on legal process, and if it is not an act of bankruptcy for a merchant to have his stock of goods levied on and sold under judgments against him, the bankrupt law is much less extended in its operation than is generally supposed, and so defective in preventing preferences as to be almost ineffectual to secure the equality among creditors which is its chief purpose.

The main argument in favor of the judgment creditor is, that the law requires an *actual intent* on the part of the debtor to give a preference, or to defeat or delay the operation of the law; and that here there is no such intent, since the debtor did not collude with the creditor, but did what he could to prevent the latter from obtaining judgment.

In our opinion the requisite intent is to be inferred from the circumstances in which the debtor was placed, and the knowledge of the parties as to the debtor's insolvency.

The debtor was insolvent, and knew it. The creditor knew it, or had reasonable cause to believe it, and because of this he made a sacrifice of more than a year's interest on his debt to procure judgment at the first term after suit was brought. If the fourteenth, twenty-third, twenty-ninth, thirty-fifth, thirty-ninth, and forty-fourth sections of the bankrupt act are studied, it will appear plain that to allow the creditor to get a priority by reason of a judgment thus obtained would subvert the law and continue the system of preferences which it was designed to abolish. By the fourteenth section, all attachments made within four months are dissolved by the assignment, and the effect of allowing the judgment creditor to receive the money, under a levy made with knowledge or belief of the debtor's insolvency, is the same as if the money had been voluntarily paid to him by ^[164] a known insolvent, or the debtor had desired and intended to give a preference to the creditor who recovered judgment.

Affirmed.

[NOTE. — See also *Giddings v. Dodd*, ante, 115; *Vanderhoof's Assignee v. City Bank*, post; *Rison v. Knapp*, post; and compare *Wright v. Filley*, post.]

Illegal Preference Renders Judgment Creditor Liable to assignee in bankruptcy. — Cited, *Giddings v. Dodd*, *Brown & Co.* ante, 116.

DARBY'S TRUSTEES v. JAMES H. LUCAS.

BANKRUPTCY — FRAUDULENT CONVEYANCES — INTENT. — To avoid a deed made by the bankrupt to a purchaser for value, it must be satisfactorily established that the latter had reasonable cause to believe that the vendor, in making the sale, intended to contravene the bankrupt act.

ID.—BANKRUPT ACT—THIRTY-FIFTH SECTION CONSTRUED.—What will avoid a conveyance under the second clause of the thirty-fifth section of the bankrupt act, considered.

SALE BY INSOLVENT—VALIDITY OF.—A debtor who is known, or believed to be embarrassed, is not disabled from making a fair and honest sale of his property with a view to keep out of bankruptcy. (*Arguendo*, per DILLON, Circuit Judge.)

Before DILLON, J., and KREKEL, J.

APPEAL from the district court for the eastern district of Missouri.

On the 24th day of April, 1869, John F. Darby, who was then, and for many years had been, a private banker, made to defendant Lucas a deed for a certain building and grounds in St. Louis, situate at the corner of Fifth and Olive Streets. The consideration for the conveyance was \$200,000, of which \$150,000 were paid by Lucas assuming a mortgage of that amount, on the property, in favor of the American Life Insurance Company of Philadelphia, and the remaining \$50,000 were paid to Darby in cash. This \$50,000 was placed by Darby in his bank, and paid out by him in the course ^[165] of his business, in a few days thereafter. Darby continued his business until July 1, 1869, when he filed his petition to be adjudicated a bankrupt, and the plaintiffs are his trustees under the forty-third section of the bankrupt. The present bill is filed by these trustees against the defendant, and states in substance, that at the date of the deed above mentioned, Darby was insolvent, and acting in contemplation of insolvency, and that the defendant at the time of making the purchase had reasonable cause to believe that Darby was insolvent, and that the transfer was made with a view to defeat, etc., the bankrupt act, and that the property was, and is worth, the sum of \$300,000.

The prayer of the bill is, that the deed be declared void, and the title to be in the trustees in bankruptcy.

The answer admits the purchase, but claims that it was made in good faith, at the instance of Darby's agents, for \$200,000, its full value, and without any knowledge, suspicion, or belief at the time that Darby was insolvent, or was acting in contemplation of insolvency, and states certain facts intended to show the good faith of the defendant in the transaction. Testimony was taken upon both sides, and at the hearing the bill

was dismissed. In ordering the dismissal, the court (TREAT, J.) observed:—

“Under the provisions of the bankrupt act, on a correct exposition of which the case depends, the ordinary dealings of men are not to be interrupted further than is necessary to secure equality among creditors, and honest and lawful dealing by and with debtors.

“A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt, or security therefor, necessarily knows, or has reasonable cause to believe, that he is thereby obtaining a preference which is forbidden by law.

“But persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as their purchases do ^[186] not necessarily enable the debtor to contravene the act or defeat any of its requirements. The purchase money may furnish the needed means of extricating the debtor from his embarrassments, especially if he be engaged in a pursuit whereby insolvency is not determinable by the ultimate outcome, but by his ability to meet his liabilities as they mature in the ordinary course of business. Mr. Darby was a banker, and therefore would have been insolvent whenever his banking liabilities were not promptly met. It seems that they had been met up to the date of this sale of real estate, though by extraordinary shifts in borrowing; and that some of his real estate paper had been past due for some time. But it also seems that he had resorted to street brokers for ten or more years, and that he has had a reputation for wealth, as owning large landed interests. Some of this paper passed through the hands of street brokers into the possession of the savings institution of which the defendant was a director, and the cashier of that institution was the agent of Mr. Darby in negotiating the sale. It seems that the inference is natural that the officers of the institution, though they may have thought him embarrassed, also deemed his paper good, or it would not have been bought. The sale of realty was not out of the usual course of business within the meaning of the bankrupt act, and therefore, it is for the plaintiff to make out his case affirmatively. The fact that paper secured by a deed of

trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan, or consent given; and does not therefore necessarily subject the debtor to the penalties of the act.

“Without, however, analyzing the testimony in detail, or passing formally upon each of the many incidental points of law presented, it must suffice that this court holds that to avoid the deed it must be satisfactorily proved that the defendant had reasonable cause to believe: First, that Mr. Darby was insolvent, or in contemplation of insolvency; and second, that by the transaction Mr. Darby intended to contravene ^[167] the bankrupt act. Now, if for the sake of argument, it were admitted that defendant knew Darby to be technically insolvent, still the second element would have to be proved, without which the highly penal provisions of sections 35 and 39 are not applicable.

“As it is clear to the mind of the court that the proof falls far short of making out the second element named, it is unnecessary to inquire particularly into the first.

“The court holds that under the second clause of section 35, in the case like that under consideration, the reasonable cause to believe each of the two elementary facts must be satisfactorily proved in order to avoid the deed.”

The complainants appeal.

Samuel Knox, and Glover & Shepley, for Complainants.

Thomas T. Gantt, for Respondent.

DILLON, *Circuit Judge*.—This is a bill by trustees in bankruptcy to avoid a deed of real estate, made by the bankrupt to the defendant. The bill is based upon the second clause of the thirty-fifth section of the bankrupt act, and charges that the sale was made in contravention thereof. Darby, the grantor, at the time the deed was executed, was a private banker, and continued in business for over two months afterwards. The defendant, the grantee, was not a creditor of Darby, and has paid the consideration for the purchase, by assuming a valid mortgage upon the property of \$150,000, and by giving his check for \$50,000, on which the money was received by Darby and used in his busi-

ness. An agent of Darby offered the property for sale, and the same was purchased at the price of \$200,000, which was the highest sum the defendant would give for it. The property was in the hands of another agent for sale at \$250,000, but he had not found a purchaser at that sum. It is not claimed that there was any fraud in fact in the transaction, or that there was any collusion between ^[168] the defendant and Darby to defraud the creditors; but it is maintained by the complainants that the defendant's purchase is prohibited by, and operates as a fraud upon, the bankrupt act.

It quite satisfactorily appears that at the time of the sale Mr. Darby did not contemplate insolvency or going into bankruptcy, but that his expectation was that he would be able by the sale of this property, and by the aid of the rents and income of other property, and by the sale thereof as advantageous opportunity offered, to keep on in business and pay all of his debts. But it is clear, also, that he was technically if not really insolvent at the time the deed was made, although he was generally believed to be possessed of considerable wealth and property.

By the bankrupt act a sale or conveyance of property by a person who is insolvent to a person who has then reasonable cause to believe him to be insolvent, and to believe that such sale or conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to defeat the object, or to evade the act, is declared to be void; and it is provided in such case that the assignee may recover the property or its value as assets of the bankrupt. (§ 35.)

The district court dismissed the bill on the ground that upon the proofs it did not appear that Lucas had reasonable cause to believe that Darby, in making the sale, intended to contravene the bankrupt act. Upon an attentive examination of the evidence, it is our opinion that Mr. Lucas did not know or believe Darby to be insolvent, but on the contrary believed him to be a man of considerable estate over his liabilities, and it is quite clear, we think, that he acted in good faith and without any belief that a fraud upon the bankrupt act was intended. In point of fact, no fraud upon it was intended, either by Darby or Lucas.

But the real inquiry is not what Mr. Lucas' actual belief

was, but whether he had good grounds or reasonable cause to believe, under all the circumstances, considering Mr. Darby's ^[160] general reputation as a man of considerable wealth and property, his known integrity and energy, the nature of his business, the defendant's want of any intimate familiarity with the exact state of Mr. Darby's affairs, and his ignorance of any change in them, we cannot say that the defendant had reasonable cause to believe Mr. Darby's purpose in selling was to evade or defeat the bankrupt act, and on this ground we are content to affirm the decree below. It is due, however, to the counsel for the complainants that we should notice briefly the view they urge in favor of a reversal of the decree. Darby being shown to have been insolvent when the deed to the defendant was made, they claim that there are but two questions left: (1) Had Mr. Lucas reasonable cause to believe he was insolvent? (2) Was the conveyance made with a view to defeat the bankrupt act?

Assuming it to be shown that Mr. Lucas had reasonable cause to believe Mr. Darby to be insolvent, they claim that the latter could not under any circumstances make a sale of property to the former; and that any sale of property, although for full value, and although no actual fraud upon creditors was intended or effected, is necessarily void under the bankrupt law. The position assumed is thus stated in the printed argument submitted to the court:—

“Whenever a merchant, trader, or banker is insolvent, that is, is unable to pay his debts in the usual course of business, and when the facts show that he is unable to pay his debts in full, the law requires him to file his petition to be adjudicated a bankrupt. It is his duty so to do, and all persons who have reasonable cause to believe the debtor to be insolvent are under obligations to do nothing to prevent or induce him to refrain from filing his petition to be adjudicated a bankrupt, in order that his property may be equally divided amongst his creditors. If the debtor fail to discharge his duty as aforesaid, and if any person deal with the person as aforesaid, both are guilty of a fraud upon the bankrupt law, and are subject to its provisions and penalties.”

^[170] We will not stop to discuss the correctness of these views

as respects dealings between a bankrupt and his creditors. In the cause before us the purchase was made by one not a creditor, and it is maintained that such a purchase is constructively fraudulent if the purchaser had reasonable cause to believe that the vendor was insolvent; that is, unable to meet his debts in the usual course of business. In other words, it is claimed that a person who is insolvent owes a duty to his creditors to go at once into voluntary bankruptcy, and that this duty is of such a nature that he cannot lawfully make any sale of his property with a view to extricate himself from his embarrassment. That a person who is known or believed to be in embarrassed circumstances, may, in good faith, borrow money and give at the time a valid security for it upon his property, was held by this court in *Darby's Trustees v. Boatman's Savings Inst.* at the last term, *ante*, p. 141.

And for the same reasons such a person may in good faith make a sale of property for a consideration received at the time, although the purchaser may know or have cause to believe the vendor is insolvent. In such a case all depends upon the good faith of parties. If the vendor's purpose in selling is to defraud his creditors, or if it is to work a fraud upon the law by illegal payments, preferences, or the like, and the purchaser knows, or has good grounds or reasonable cause to believe that such is the purpose of the vendor, then his purchase is void.

But it would never do to hold, because a man is unable to meet his debts as they mature, that he is disabled from making a fair and honest sale of his property with a view to keep out of bankruptcy. The notion is a mistaken one which supposes that the law makes it the *duty* of such a person not to sell, but at once to go to the bankrupt court and ask to be adjudged a bankrupt. It is true that the law declares that such a person shall not make any preferences. It is also true that, ordinarily, creditors may force such a person into bankruptcy. [171] But it is not true that he cannot by means of pledges or sales of his property fairly made, endeavor to keep along in business and to avoid, if possible, going into bankruptcy. On this point we concur in the views expressed by the learned judge of the district court in dismissing the bill. If, therefore, it was an established fact that Lucas had reasonable cause to believe Darby

was insolvent, our opinion would still be that the bill ought to be dismissed because the sale was fairly made by Darby from the conviction that it would enable him to keep along in business, and the property was purchased by Lucas with no good ground to believe that Darby intended to delay, defeat, or evade the bankrupt act, or that such would be the effect of the transaction.

KREKEL, J., concurs.

Affirmed.

WRIGHT v. FILLEY.

BANKRUPTCY—INTENT TO PREFER.—Where an actual intent to give a preference is negatived, mere honest inaction on the part of an insolvent debtor who is sued on a just debt, and who allows judgment to go against him, and his property to be levied on, is not an act of bankruptcy within the thirty-ninth section of the bankrupt act.

Before MR. JUSTICE MILLER.

WRIGHT was proceeded against in the district court for the eastern district of Missouri, by Filley, a creditor, under the thirty-ninth section of the bankrupt act. The act of bankruptcy charged was, that Wright had “suffered his property to be taken on legal process with intent to give a preference.”

[173] To establish this the creditors relied on the fact that Wright was indebted to one Carr on two promissory notes, had been sued by Carr on one of them, had made default and allowed judgment to pass against him, and certain land to be seized and sold on the execution issued thereon.

The testimony of Wright on the hearing in the bankruptcy court showed that he had no defense to the note. He says, *inter alia*, “I did not see Carr before he brought suit—I forgot the suit, being out of town the time it was to come off. After he got judgment I endeavored to settle the matter with Carr. He brought suit on the other note, to which I put in a defense, and which is still pending. After judgment I tried to get Carr to wait on me, and to effect a compromise with him to prevent my property from being sold under his execution, but he would

not consent. I had no desire or intention to give Carr any preference, or to prevent my property being distributed under the bankrupt act."

The evidence fairly negatived any actual design on the part of Wright to give Carr a preference or to defeat or delay the operation of the bankrupt act. Wright was not a banker, merchant, trader, or manufacturer. The district court (JUDGE KREKEL sitting in the place of JUDGE TREAT) adjudged Wright to be a bankrupt. To reverse the order Wright filed the present bill in this court under the second section of the bankrupt act, and the matter was argued before Mr. JUSTICE MILLER, at the October term, 1870.

Dryden, Lindley & Dryden, for Wright.

Samual S. Boyd, for Filley.

MR. JUSTICE MILLER. — This is a bill in chancery filed in the circuit court for the districts of Missouri to obtain a review and reversal of the order of the district court declaring the complainant to be a bankrupt. The parties waived all question, whether this is the proper mode of obtaining a review of such an order, and desire the circuit court to pass on the merits of the case.

[173] The complainant was declared a bankrupt at the suit of his creditors, and the only ground on which the order can be sustained is, that he suffered a judgment for a small amount to be obtained against him, on which an execution was issued and levied on some of his property.

It seems clear that the complainant was quite poor, and that it might have given him serious inconvenience to have paid a lawyer to prepare his papers for voluntary bankruptcy or to have given security for the fees in such a proceeding. The debt on which the judgment was procured was a real debt, was due and unpaid, and he had no defense against it. There is not the least reason to suppose that he desired to give the creditor who got the judgment any preference or advantage over his other creditors, or that he in any manner whatever suggested or encouraged the suit or the levy of the execution. It is therefore clear that the order of bankruptcy can only be sustained on the ground that he did not go into voluntary bankruptcy when he was sued,

and that his failure to do so when he was unable to meet his debts was itself an act of bankruptcy.

I have read the opinions of several eminent district judges asserting this doctrine as essential to the due administration of the bankrupt law, and have the highest respect for these judges and especially for the one who made this order, and I have held up this case to see if I could bring my mind to its adoption. But I cannot satisfy myself that mere honest inaction in a poor man, when his creditor seeks to make by law a just debt, is itself an act of bankruptcy, and if Congress means that, they must, so far I am concerned, say it in plainer terms than are to be found in the present law.

Let a decree be entered reversing the order of bankruptcy rendered in the district court.

Ordered accordingly.

[174] [NOTE.—In the opinion delivered by the district judge in this case, he placed his judgment upon the ground that it was the legal duty of a debtor, who knows himself to be insolvent, when sued upon a just debt, which will result in a judgment, that if enforced will give that creditor a preference to go into voluntary bankruptcy; and that if he fails to do so and his property is seized, this is, “suffering it to be taken on legal process,” and the intent to give a preference, or to defeat the bankrupt act will or should be inferred from the mere failure to comply with his legal duty, or from the circumstances connected with his situation. (See *Vanderhoof's Assignee v. City Bank of St. Paul*, post; *Linkman v. Wilcox*, ante, 161; *Giddings v. Dodd*, ante, 115.)]

BAILEY v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

CORPORATION—CONSTRUCTION OF PREFERRED STOCK CERTIFICATE.—Preferred stock certificates issued by the railroad company, construed, and held to give the holders thereof a preferable right to the first seven per cent of the net earnings each year; after which the holders of common stock are entitled to next seven per cent, and if any surplus it is to go to holders of the preferred and common stock equally.

Before DILLON, J., TREAT, J., and KREKEL, J.

THE complainant is the owner of eight hundred shares of the *preferred* stock issued by the defendant. The only question in

the case is as to the extent of the respective rights of the preferred and common stock to dividends.

The certificates for the preferred stock recite that they are "issued in adjustment of the bonds of the company bearing date," etc., "and subject to the terms and conditions of an indenture between the said corporation and Wm. Swift and others, trustees, dated April 1, 1863, and with the rights therein set forth, and certifies that the holder is entitled to ——— shares of the *preferred stock* of the said corporation, and shall be *entitled to receive all the net earnings of said company, which may be divided pursuant to said indenture, in each year up to seven dollars per share, and to share in any surplus beyond* ^[175] *seven dollars per share, which may be divided upon the common stock.*" In the indenture of April 1, 1863, is an agreement "that said preferred stock shall be entitled to a dividend of seven per cent from the net earnings of said road, in each year, before any dividend shall be declared upon other unpreferred shares of the said corporation, *and to an equal dividend with said other shares, in the net earnings of said corporation beyond said seven per cent.*"

The history of the issue of this preferred stock is briefly this: The war and other causes had in 1862 greatly embarrassed the company, and on the 15th day of October of that year the directors adopted a "plan" to extricate the company from its difficulties, which was set forth at length in a circular to the owners of bonds under the different mortgages. This *project* contemplated a relinquishment by them of a certain amount of their bonds, and the taking in the place thereof *preferred stock*. The character of the preferred stock to be taken is thus described in the plan: "The preferred stock to be seven per cent and not cumulative, but *to share with the common stock any surplus which may be earned over and above seven per cent upon both, in any one year.*"

It was this plan, without modification, to which the bondholders consented, and they signed an instrument to that effect, agreeing to surrender bonds "in accordance with the provisions of the plan of October 15, 1862, hereunto annexed," and to receive preferred stock therefor.

The assent of all the bondholders having been obtained to this plan by the latter part of February, 1863, the aforemen-

tioned indenture of April 1, 1863, was drafted ; and the evidence (the competency of which is objected to by the complainant) establishes that the purpose was to carry out and not to change the provisions of this plan. Indeed, there was no authority in the committee having the matter in charge to change it. On the 30th day of May, 1863, pursuant to notice, a meeting of the stockholders of the company ratified what had been done, and consented to and adopted ^[176] the indenture of April 1, 1863, a printed copy of which was submitted to it, and certificates of preferred stock, in the form above mentioned, were from time to time issued to the bondholders by the company. No dividends were made prior to the year 1870.

On the 29th day of June, of that year, a seven per cent dividend was voted to the holders of the preferred stock, and three and one half per cent dividend was voted to the common stock out of the earnings of the first six months of 1870, and it was also voted that the earnings of the road for the remaining six months be applied to pay the further dividend of three and one half per cent on said common stock.

To the carrying out of this vote in favor of the common stock the complainant objects, and files this bill for an injunction and relief.

Glover & Shepley, for the Complainant.

Thomas T. Gantt & James Carr, for the Railroad Company.

DILLON, *Circuit Judge*. —It is admitted on both sides that the holders of the preferred stock are entitled to receive all the net earnings in each year, up to seven per cent. The dispute relates to the net earnings over seven per cent. The defendant claims that when the preferred stock has in any one year received its seven dollars per share, the common stock is entitled to receive seven dollars per share if so much shall have been earned, and that if there be any surplus beyond this, the two kinds of stock shall share it equally. For example : if the net earnings for a year shall be just twelve per cent, the preferred stock first gets its seven, and the common stock the remaining five per cent ; if the earnings shall be sixteen per cent, the pre-

ferred and common stock will each get its seven, and then share equally in the other two per cent.

On the other hand, the complainant claims that the preferred stock is first entitled to seven per cent, and that it and the common stock share equally in any surplus beyond the ^[177] seven per cent, admitted to be first due to the preferred stock. For example: if the net earnings in any one year are twelve per cent, the complainant insists that the preferred stock is first to get its seven (and this is admitted), and then to get one half of the remaining five per cent, and the common stock the other half. This is controverted by the defendant, who insists as above stated, that the common stock is in such a case entitled to the whole of the five per cent. Both parties maintain that their positions are warranted by the language of the stock certificates. And the complainant insists that if there is any doubt upon the face of the certificate of the stock, it is removed by the language of the indenture of April 1, 1863, which it recites, and to which by its terms it is subject. On the other hand, the respondent contends that such is not the true construction of the indenture, especially when taken as it should be, in connection with the certificate, and that this is indubitably shown by the history of the issue of the preferred stock, and the *aliunde* testimony mentioned in the statement of the case. The complainant stands upon the stock certificate and indenture, and objects that all testimony outside of these is inadmissible to vary their construction or to affect his rights. The competency, in this proceeding, of the testimony *aliunde* it is not necessary to discuss, for after a careful consideration of the language of the stock certificate the court is of opinion that it does not support the claim of the complainant, but does sustain that of the respondent. The "surplus" mentioned in the certificate refers to what may remain after the preferred and the common stock has each had its seven dollars per share. If the intention had been as claimed by the complainant, all the language after the word "surplus," would be unnecessary; and the construction put upon it by the company is the only one which will give effect to all the language employed. The use in the indenture of the word "said," in the phrase "*said* seven per cent," is a clerical error, and construing the certificate and indenture to-

gether, it should not have ^[178] the effect to change the rights of holders of the common stock.

We will not say that the language used does not raise a difficulty, but we think the result we have reached fairly warranted by the stock certificate and indenture, and we know (if it be proper to consider the extraneous evidence) that it is the one which was contemplated by all parties to the arrangement under which the preferred stock was issued.

The injunction will be dissolved and the bill dismissed.

TREAT, J., and KREKEL, J., concurred.

Ordered accordingly.

Note. Judgment Affirmed on appeal, 17 Wall. 96.

IN RE MARVIN, BANKRUPT.

BANKRUPTCY—INSANE DEBTORS.—A person who is so unsound in mind as to be wholly incapable of managing his affairs cannot commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian.

Before DILLON, J., and KREKEL, J.

A PETITION was filed in February, 1871, in the district court for the eastern district of Missouri, by creditors, under the thirty-ninth section of the bankrupt act, for an adjudication of bankruptcy against William L. Marvin. Two acts of bankruptcy were charged.

1. That Marvin, being a merchant, on the 4th day of January, 1871, suspended and did not resume payment of his commercial paper within fourteen days, nor at any time thereafter.

2. That in January, 1871, Marvin being insolvent, did suffer his property to be taken on legal process under writs of ^[179] execution and attachment, with intent to defeat and delay the operation of the bankrupt act.

Marvin, by his guardian, appeared and filed an answer to the petition, stating that on the 30th day of January, 1871 (prior to the filing of the petition in bankruptcy), by due proceedings in the probate court of St. Louis County, Marvin was

adjudged to be a person of unsound mind, and incapable of managing his affairs, and that by an order of said court D. B. Lee was duly appointed, and has qualified as guardian of the person and estate of the said Marvin. And the answer states that at the time mentioned in the petition, when the acts of bankruptcy were committed, Marvin was a person of unsound mind, wholly incapable of managing his business, and of committing any of the acts of bankruptcy charged against him, and had been in that condition of mind for more than six months before the commencement of the proceedings in bankruptcy.

The district court (TREAT, J.) held this to be a good answer to the petition, and accordingly overruled a demurrer thereto, and the petitioning creditors electing to abide by the demurrer, their petition was dismissed, and they bring the question into this court for review.

Tatum & Horner, for the Petitioning Creditors.

B. D. Lee, opposed.

DILLON, *Circuit Judge*, referring to the somewhat unsatisfactory state of the authorities cited in the note, observed, that upon consideration, the court is of the opinion that a person who is so unsound in mind as to be *wholly incapable* of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian. Whether such a person, on the petition of himself or guardian, may, if insolvent, go into voluntary bankruptcy, the court gives no opinion.

KREKEL, J., concurs.

Affirmed.

[180] [NOTE. — Shelford says: "An inquisition of lunacy will not protect a lunatic against an action, and a commission of bankruptcy is a species of action against which lunacy cannot be used as a defense (*Anon.* 13 Ves. 590), if the act of bankruptcy was committed when the party was sane; for a lunatic under the influence of that visitation cannot commit an act of bankruptcy. (Citing *Ex parte Priddy*, 8th June, 1793; Shelford on Lunatics, 429.) See 2 Pars. Cont. (4th ed.) 617, 3 Pars. Cont. (5th ed.), 461, where the author seems to intimate a contrary doctrine, but no authorities to the point are cited. But see *Ex parte Stamp*, 1 De Gex, 345.

Insane Debtor Cannot Commit an Act of Bankruptcy. — Cited, *In re Weitzel*, 7 Bliss. 292; *In re Pratt*, 6 Bank. Reg. 276; S. C. 2 Low. 97.

EASTERN DISTRICT OF ARKANSAS.

[181] RISON, ASSIGNEE, ETC., v. CRIBBS.

COMPETENCY OF PARTIES AS WITNESSES.—Since the Act of Congress of July 2, 1864 (18 Stats. 351, § 3), making parties competent witnesses (however it might have been before), a complainant in chancery who takes the deposition of a respondent, adversely interested, though without a previous order of court specially reserving his rights, does not by operation of law thereby *release* the respondent who gives his testimony from the liabilities set up against him in the bill. Nor does the complainant, by such act, *estop* himself to deny the truth of the evidence given by the respondent.

CIVIL ACTION—WHAT INCLUDED.—The phrase “civil action,” in the statute of July 2, 1864, is used in distinction from *criminal* actions (*Green v. United States*, 9 Wall. 655), and includes *suits in chancery* as well as *actions at law*. (Per MILLER, J.)

PARTIES—TESTIMONY UNDER COMPELSION.—Whether under this act an unwilling party can be *compelled* to testify, except in cases where before the act he would be bound to do so. *Quere?*

[182] **EVIDENCE OF PARTIES—ACT OF JULY 2, 1864.**—This act of Congress was designed “to introduce a very important change amounting to a revolution in the law of evidence, and it is not for the courts to counteract the legislative will by distinctions at variance with the general scope of the new principle intended to be established.” (Per MILLER, J., *arguendo*.)

Before MR. JUSTICE MILLER.

THIS is an appeal from a decree of the district court of the eastern district of Arkansas, in bankruptcy.

The complainant's bill was dismissed, and the assignee appeals. The facts sufficiently appear in the opinion. The third section of the Act of Congress of July 2, 1864 (13 U. S. Stats. 351), which was held to govern the question presented for decision, is in these words: “In the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried.” Amended March 3, 1865 (13 U. S. Stats. 533), in particulars not important in the present cause.

Ringo & Yonley, for the Appellant.

Garland & Nash, for the Appellee.

[NOTE.—In the western district of Arkansas the district court has circuit court powers.]

MR. JUSTICE MILLER. — This is an appeal from a decree of the district court, in bankruptcy.

Andrew J. Little having been declared a bankrupt, on the petition of some of his creditors, and Rison appointed assignee, the latter brought suit in chancery against Cribbs and others, to recover a large stock of goods which he claimed to have been fraudulently transferred by the bankrupt to the defendants.

The district court rendered a decree in favor of the assignee against all of the defendants except Cribbs, and dismissed the bill as to Cribbs. From this decree in favor of Cribbs the assignee has appealed to this court, and I am now called ^[183] on to review the action of the district court in that matter. The decree from which this appeal is taken uses this language: "That as to the said defendant, Cullen G. Cribbs, complainant's said bill of complaint be, and the same is hereby dismissed, and that he go hence discharged therefrom without day, said complainant having released and discharged him of all liability in this suit by taking his deposition without the leave of this court, to be read as evidence on the trial of this cause, and proved by him as such witness that his purchase of the goods mentioned in the pleadings was made without any knowledge of the insolvency of his vendor, the said Andrew J. Little, bankrupt, or that he was indebted on account of his purchase of said goods, and that his, Cribb's purchase, was made *bona fide*, and for a valuable consideration, without notice."

I have made a careful examination of all the testimony in the case, and it leaves no doubt that Cribbs did know all about the insolvency of the bankrupt, and took an active part in the effort of the latter to defraud his creditors, with a full knowledge of his purpose in making the sale of his stock of goods. I am therefore satisfied that the district court, in the latter part of the recital, does not mean to say that, in point of moral force, the testimony of Cribbs over balanced the other evidence, and produced a conviction of his innocence, but its meaning is, that plaintiff having sworn this, defendant in his own behalf is estopped to deny what he says in answer to plaintiff's interrogatories. Yet I can hardly believe that such a proposition, if separately and clearly stated, would have been made the foundation of the decree by the court below, and I suppose it must

be taken in its connection with the first proposition on which the decree was founded, and which is mainly relied on in argument here to support it.

That proposition, as I understand it, is, that when a complainant in chancery takes the deposition of one of several defendants, to be used on the hearing of the case, the legal effect of that act is, to release the witness from the liability ^[184] set up against him in the bill, unless there has been a previous order of the court, directing such deposition to be taken, and preserving the substantial rights of the parties against prejudice from that departure from the usual course of chancery practice.

I do not purpose to go into the inquiry whether such was the rule of the English court of chancery unaffected by legislation. The counsel for the appellee has undoubtedly produced authorities which seem to favor that view of the question. But as I think the recent legislation of Congress, in regard to the competency of parties to civil actions in the federal courts, must govern the action of the court in this case, it is unnecessary to inquire further into the more ancient doctrine of the chancery practice.

The third section of the Act of July 2, 1864 (13 U. S. Stats. 351), introduces into the federal courts a new and very important rule of evidence.

“In the court of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to or interested in the issue tried.”

The phrase “*civil* actions” is here used undoubtedly as opposed to criminal actions, and therefore includes suits in chancery as well as suits at law. That the phrase is used in contradistinction to criminal actions, is held by the supreme court in the case of *Green v. United States*, 9 Wall. 655.)

The reason of this change in the law of evidence is as pertinent to equity as to common law courts, and the terms in which the legislature has expressed its will, leave no ground for excluding it from the one any more than the other. It is also to be considered that the Act of 1864 merely introduces into the practice of the federal courts a principle which has been extensively adopted in the States, by State legislatures, in which no such distinction has been made.

In the case before us, the question does not arise, whether a party to a suit can be *compelled* under this act of Congress to testify at the instance of his opponent, when he is otherwise [185] unwilling to do so. In case of the refusal of a party to a suit to testify at the instance of his opponent, it might be a question whether the act of Congress is intended to compel him to do so under any other circumstances than where he was bound to testify before the passage of the statute. But in the case before me, the defendant, when requested to testify, did so voluntarily, and as the act of Congress renders him a competent witness by removing all the disability which the common law attached to him as a party to the suit, or by reason of his interest in the event of the suit, it seems to me there remains no ground for holding that he is thereby released from the claim set up against him in the bill. The foundation of the rule in chancery must have been, that as the witness could only become competent by releasing him from all liability, depending on the event of the suit, the law would presume or enforce such release when he was used as a witness against other parties to the suit.

But this objection of interest in the witness is precisely that which is abolished by the act of Congress, and therefore no such legal presumption arises, or is necessary to reconcile the use of the testimony with a principle which no longer exists.

It is also obvious that if, as we suppose, the act of Congress renders the witness competent, that competency cannot depend upon an order of court, nor can the use of his evidence work a release of the claim which the testimony of the witness is intended to establish. Such conditions annexed to the use of a witness who by the old chancery rule was incompetent, cannot now be imposed on the use of a witness rendered competent by statute.

The act of Congress was undoubtedly designed, by those who enacted it, to introduce a very important change amounting to a revolution in the law of evidence, and it is not for the courts to counteract the legislative will by distinctions at variance with the general scope of the new principle intended to be established.

[186] The decree is reversed, and the case remanded to the district court, with directions to render a decree in favor of com-

plainant, holding Cribbs liable for the fraudulent purchase of the bankrupt's goods.

Reversed.

[NOTE. — That one party to a *civil action* may compel his adversary to testify, (see *Berry v. Fletcher*, ante, 66) ; but that the defendant in a *criminal case* is not competent to testify in his own behalf, in the federal courts, see *United States v. Hawthorne*, post.]

Parties Competent to Testify as Witnesses. — Cited, *Berry v. Fletcher*, ante, 66 ; *Insurance Co. v. Stanchfield*, post, 429.

RISON, ASSIGNEE, v. KNAPP.

BANKRUPTCY — FRAUDULENT PREFERENCE. — Where the bankrupts had knowledge of facts sufficient to bring home to the minds of reasonable men knowledge of their insolvency, they must be held to have had that knowledge, and a mortgage to a creditor with knowledge of these facts of their stock of goods is in fraud of the bankrupt act, and the assignee in bankruptcy can maintain an action of trover to recover the value of the property.

BANKRUPT ACT — INSOLVENCY — WHAT CONSTITUTES. — The word "insolvency," as used in the existing bankrupt act, must be construed to mean, not an absolute inability to pay debts at some future time, upon the settlement and winding up of the party's affairs, but a present inability to pay, as debts mature in the ordinary course of business, although this inability be not so great as to compel an absolute suspension. (*Arguendo*, per CALDWELL, J.)

Id. — A debtor does not cease to be insolvent because, being unable to pay his debts as they mature, his creditors have agreed to extend the time of payment (see *Kinsing's Assignee v. Bartholew*, ante, 155) ; and the payment of a pre-existing debt by an insolvent is on his part illegal under the bankrupt act, though made in the expectation by him that he will eventually be able to pay all. (*Arguendo*, per CALDWELL, J.)

FRAUDULENT PREFERENCE — INTENT PRESUMED. — The conveyance of the whole of the property of a party to one creditor to secure a pre-existing debt is fraudulent and void, and the party must be presumed to have known the natural consequences of his own act ; and the intent to prefer may be inferred from the fact of preference.

CONVEYANCE OUT OF COURSE OF BUSINESS. — A conveyance not made in the usual and ordinary course of business of a debtor is *prima facie* fraudulent and void. The phrase "usual and ordinary course of business," construed.

[187] **BANKRUPTCY — MORTGAGE UNDER PRESSURE, VOID.** — The doctrine of pressure by a creditor to force the giving of security for the payment of a debt is not applicable under the present bankrupt act, and it is no answer when a debtor mortgages his property to secure such a debt to say that he was "pressed to do it."

NOTICE OF BANKRUPTCY — WHAT SUFFICIENT. — When a party knows at the time of purchasing goods that the bankrupts had failed in business, and that his vendors held the goods under mortgage from the bankrupts, these facts are sufficient to put him on his guard, and he is bound to inquire into the transactions between the bankrupts and his own vendors.

ID. — GOOD FAITH, PROOF OF. — To constitute a *bona fide* purchaser for value, he must not only show that he had no notice, but he must have paid a consideration at the time of the transfer, either in money or in other property, or by a surrender of existing debts or securities.

Before CALDWELL, J.

THE facts are stated in the opinion.

U. M. Rose & T. D. W. Yonley, for the Plaintiff.

Clark, Williams & Martin, for the Defendants.

CALDWELL, *District Judge*. — This is an action of trover, brought by the plaintiff, as assignee in bankruptcy of Heddens & McDiarmid, against the defendant Knapp, for goods of the bankrupts converted before they were adjudicated bankrupts. The defendant filed his plea of “not guilty,” and the parties by agreement have submitted the questions of fact as well as of law to the court.

The material facts in the case are these: Heddens & McDiarmid, the bankrupts, purchased an old stock of general merchandise, and commenced business as retail merchants in the city of Little Rock, in September, 1866. In February, 1867, they were indebted to W. W. Walton, or his assignees, on account of the purchase of their original stock, in the sum of \$4,000, and one of their partners, Heddens, was indebted to the same party on the same account in the sum of \$500. They were also indebted to Chambers, Sterns & Co., of Cincinnati, Ohio, for goods purchased, in the sum of \$2,267.97, ^[186] and to Prichard, Alter & Co., of Cincinnati, for goods purchased in the sum of \$595.55.

In February, 1867, the firm notes for all of this indebtedness (except the \$500) were outstanding and overdue, and suit had been brought in the circuit court of the United States for this district against the firm, on the notes payable to Chambers, Sterns & Co., and to Prichard, Alter & Co., and against Heddens on the \$500 note; and about this time the creditors of Walton sued out writs of garnishment against them, on account of their indebtedness to Walton. They were also indebted at this time to Campbell & Strong, cotton factors at New Orleans,

in about the sum of \$5,000 for money advanced on cotton, and to Barnes & Bro., of Little Rock, in the sum of \$2,000 on cash account.

Finding themselves in embarrassed circumstances and unable to meet their commercial paper, one of the bankrupts, McDiarmid, testifies that he went to New Orleans about the 1st of March to see Campbell & Strong, and, if possible, obtain from them some further advances, to enable them to pay off their Cincinnati indebtedness, on which suit had been brought, and which would probably go into judgment early in April.

The witness says he represented to Campbell & Strong that they (the bankrupts) had in their store at Little Rock, a stock of goods worth about \$10,000 or \$12,000; that they owed to Cincinnati houses about \$3,000, that suits had been brought on these claims, and judgments would probably be obtained about the 8th of April.

The witness says he told Campbell & Strong about the \$4,000 indebtedness to Walton, but stated to them that they (the bankrupts) had a set-off against this indebtedness. What this set-off was does not appear, and it does not appear that the bankrupts had any valid defense to any part of this indebtedness. Nothing was said to Campbell & Strong about the \$2,000 indebtedness of the bankrupts to Barnes & Bro., or the \$500 indebtedness of one of the partners, Heddens, to Walton.

[189] After making this statement of their affairs, the witness says he proposed to Campbell & Strong that if they would make a further advance of \$3,000, to enable his firm to discharge the Cincinnati debts, they would mortgage or convey to Campbell & Strong their stock of goods to secure the \$5,000 then due, as well as the amount of the new advance.

Campbell & Strong referred the matter to their attorneys at Little Rock, writing them as follows:—

“NEW ORLEANS, 12th March, 1867.

“Per McDIARMID.

“*Samuel W. Williams, Esq., or Clarke, Williams & Martin,*
Little Rock, Arkansas.

“GENTLEMEN:—Mr. McDiarmid, of the house of Heddens & McDiarmid, of your city, is now here, and we have settled with them, and find due us cash advanced on cotton \$6,571.58,

for which we have taken their notes at thirty and sixty days (half each) against which they now have in our hands nineteen bales of cotton, which, when sold, will apply on first note, say, probably, \$2,100, leaving due us about \$4,471.58, for security of which they have agreed to make over to us their entire stock of goods in their store at Little Rock, which they say will amount to \$15,000. H. & McD. are owing a debt of \$2,700 to two houses in Cincinnati, who have sent on their claims to force collection, and will, as they say, go into judgment against them at your next term of court, 8th April next, and which they (H. & McD.) say they can put off payment of until December next, by giving our acceptance.

"They represent to us that all they owe is this debt of \$2,700. Now we wish you to take an assignment of their entire stock of goods to us, to first secure the \$4,400 or \$4,500 now due us, and allow them to go on with this business as before (if such a thing can be done safely) and if you can get abundance of security, over and above the amount now due us, we will accept for them for the amount of \$2,700 at nine months.

"On receipt of this you will please call on them and learn [190] all the particulars of their business, their standing, etc., and take the security as before stated, or in any way they can secure us to your satisfaction. They desire to first secure us before these claims from Cincinnati are put into judgment against them, or if we can be made perfectly safe, we are willing to go on their paper for \$2,700 at nine months, in which case they will continue their shipments of cotton to us as before and not draw for more than half the value of shipments till they get the \$4,400 debt paid, and the acceptance of \$2,700 they can meet in the fall by shipments of cotton or cash payments through the summer.

"They are wanting about \$300 worth of dry goods now, which we will purchase and ship them per first boat; besides, Mr. McDiarmid wants \$75 to go home with, which we will let him have, and which will increase their account to \$400. We suppose they now have a shipment of cotton on the way, as we are just presented with another of their drafts at five days for \$600. Our young man, Mr. James H. Pashal, is in your part of the country, and will call and see you. You can show him

this letter, and concur and advise with him and with us at your earliest possible convenience. To sum up, if an assignment, transfer, or sale of their stock of goods to us can be legally made, so as to secure first their present indebtedness, and meet the further acceptance of \$2,700 to be granted them, please take the same in a proper shape. Your immediate attention to this, and your early reply, are particularly requested.

“Very respectfully yours,

“CAMPBELL & STRONG.”

The bankrupts made substantially the same statement to the attorneys of Campbell & Strong in this city, in relation to their affairs, that had been made by McDiarmid to Campbell & Strong in New Orleans. The evidence does not show whether the attorneys of Campbell & Strong made any effort to verify the correctness of the bankrupts' statements as to the value of their stock of goods, or the amount of their indebtedness; but [191] on the 21st March the bankrupts executed and delivered to the attorneys of Campbell & Strong a bill of sale of their entire stock of goods. The preamble to the bill is as follows: “Whereas, we, Heddens & McDiarmid, are indebted to Campbell & Strong, of New Orleans, Louisiana, in about the sum of \$4,000; and whereas, we desire further advances to the amount of say \$3,000, which the said Campbell & Strong agree to advance by accepting our drafts due 1st day of January next, *provided the property hereinafter conveyed shall be sufficient to secure the same, together with our present indebtedness, as aforesaid.*”

Following this preamble is a conveyance of the stock of goods for the purpose of securing and paying said indebtedness, and any advances that may be made.

The trustee mentioned in the conveyance, George Kingsbury, had been the clerk of Heddens & McDiarmid ever since they had been in business. After this conveyance, Heddens & McDiarmid continued in the store as before, and in the language of the witness, Kingsbury, “drew their living from it, and paid their small debts about town out of it.” Immediately, or very soon after this conveyance was executed, an invoice of the goods was taken, when it appeared that there was not more than \$6,000 or \$7,000 worth of goods in the store, valuing them at cost price, and that many of the goods

were old, and had been purchased in 1865 and 1866, when goods were very high, and their actual cash value at the time the invoice was taken was not more than \$3,000 or \$4,000.

The trustee, Kingsbury, knew the character and value of the goods before and at the time of the conveyance, and could and would have imparted the facts to Campbell & Strong, or their attorneys, if he had been applied to for that purpose.

Campbell & Strong never made any advances to Heddens & McDiarmid after the goods were conveyed to them. On the 9th day of April, Heddens & McDiarmid mortgaged the same stock of goods (subject to the previous conveyance to Campbell & Strong) to Barnes & Bro., to secure an indebtedness ^[192] of \$2,200. Barnes & Bro. had full notice of the condition of the bankrupt's affairs at the time they took their mortgage. Neither Heddens nor McDiarmid had any individual property, and the stock of goods comprised all the partnership assets except their book of accounts, amounting nominally to about \$2,000, but of which only \$300 or \$400 were collectible or of any value.

McDiarmid, one of the bankrupts, swears that he did not consider the firm broken up or insolvent at the date of the transactions, and that they expected to be able to continue in business if they could get Campbell & Strong to advance them \$3,000 to pay off their Cincinnati debts, then overdue and in suit. On the 29th day of May, Campbell & Strong and Barnes & Bro., claiming the property under the mortgages made to them, respectively, by Heddens & McDiarmid, sold the goods in question to the defendant Knapp. Knapp was to pay \$3,500 for the goods, for which sum he executed his notes, payable in six and nine months from date. He paid nothing down, and has paid nothing on the notes, and don't expect to pay if this suit goes against him.

The parties from whom Knapp purchased the goods still hold his notes, and they are overdue. Knapp knew of the failure of Heddens & McDiarmid at the time he purchased, and the marshal levied on the goods as the property of Heddens & McDiarmid about thirty minutes after he acquired the possession under his purchase.

On the 15th day of August, 1867, Heddens & McDiarmid were adjudicated bankrupts on the petition of their Cincinnati

creditors, and the plaintiff in this case was afterwards duly appointed their assignee. The proof establishes, beyond doubt, the utter insolvency of Heddens & McDiarmid at the date of these transactions. They had no individual property, and the goods in the store and their book accounts composed their entire partnership assets.

The goods were not worth, at the date of their sale to Campbell & Strong, over \$5,000. The weight of evidence ^[193] shows that this sum could not have been realized from their sale, in the ordinary course of business, and the store accounts did not exceed \$400 in value. At the same time their debts amounted in the aggregate to \$14,000.

But it is said the bankrupts were ignorant of the actual condition of their affairs, and honestly believed they would be able to continue their business and pay their debts, and that this sale to Campbell & Strong was made to enable them to do this, that the term "insolvent," as used in the bankrupt act, means one whose business is actually broken up for want of means to carry it on, and not a mere present inability to pay debts in the ordinary course of business — that a merchant may not be able to pay his debts, as they mature, and still not be insolvent, and that a merchant so circumstanced, and entertaining an honest belief of his ability to ultimately pay his debts, may lawfully do what the bankrupts did in this case.

The bankrupts had full knowledge of the condition of their affairs; they knew the amount of their indebtedness, and they knew they had no assets except their stock of goods. They knew the character, cost, and value of these goods, for most of them had been on their shelves more than a year, and they must have known, what is so clearly established by the testimony, that the receipts from the sale of this stock of goods, in the ordinary course of business, would not more than pay the rent of the storehouse, and defray the current expenses, which were drawn, and expected to be drawn, from the store, and that they would cease to do this in a short time.

Grant that the bankrupts believed they would be able to support their families, pay all the current expenses of their business, and discharge some \$14,000 of indebtedness with an old stock of goods, the actual value of which was less than one half of

the amount of their indebtedness—can a belief, so chimerical, however, honestly entertained, alter the facts?

Whatever their belief was, the fact of hopeless insolvency remained, and having knowledge of facts sufficient to bring [194] home to the minds of reasonable men knowledge of their insolvency, they must be held to have had that knowledge. (*Merchants' National Bank of Hastings v. Truax*, 1 Bank. Reg. 146.)

The words “insolvent, or in contemplation of insolvency or bankruptcy,” in this act, are not to receive the interpretation put upon the words “in contemplation of bankruptcy,” occurring in the second section of the Bankrupt Act of 1841.

Different interpretations were placed upon the words “in contemplation of bankruptcy,” in the Act of 1841, in different circuits. In some circuits they were held to mean contemplation of insolvency, and inability to pay as debts should become payable, whereby the debtor's business would be broken up. In another circuit, it was held the debtor must contemplate an *act of bankruptcy*, or a decree adjudging him a bankrupt on his own petition. The latter interpretation was finally given to them by the supreme court. (*Buckingham v. McLean*, 13 How. 150.) In this case, the supreme court defines “contemplation of insolvency” to mean “inability to pay as debts become payable, whereby the business would be broken up.” And it is here settled that “contemplation of bankruptcy” meant something more than insolvency. (*Carr v. Hilton et al.* 1 Curt. 224.)

The thirty-fifth section of the Act of March 2, 1867, is almost identical with sections 90 and 91 of the insolvent act of Massachusetts. (See appendix to Hilliard on Bankruptcy, 466.)

The words in question, “insolvent, or in contemplation of insolvency,” are used in the thirty-fifth section of the bankrupt act, in precisely the same connection that they occur in the Massachusetts insolvent law; and Congress, having adopted the very words of that law, and those words having received an interpretation by the supreme court of that State, which was well known and understood at the time the bankrupt act was passed, it must be held (in the absence of something showing a contrary intention) that they were intended to have the same meaning, and receive the same construction given to them in that State.

[195] And the supreme court of Massachusetts has held that the term "insolvency," as used in the insolvent act of that State, when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business, and that a trader is insolvent when he cannot pay his debts in the ordinary course of business as men in trade usually do, although his inability be not so great as to compel him to stop business, and although he may be able to pay his debts at a future time, upon the winding up of his concerns. (*Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; Kent Com. 10th ed. 509, note a; *Vernard v. McConnell et al.* 11 Allen, 505.)

In the last case cited, Chief Justice Bigelow, speaking for the supreme court of Massachusetts, says: "Nor can it be doubted that the appellant was insolvent, in the legal sense of the word, if he was unable to pay his debts as they fell due, according to the usage of the trade in which he was engaged, and of the place in which he carried on his business, in ordinary times and under ordinary circumstances, notwithstanding many others employed in similar occupations may also have been in a like condition of insolvency. The proposition cannot be maintained consistently with the established rules of law, that a debtor ceases to be insolvent because, being unable to pay his debts in the regular course of business, his creditors have entered into an agreement to extend the time of payment of their debts; or that the payment of a debt by a party who is insolvent cannot be regarded as a preference if made with the hope and expectation by the debtor that he will be able eventually to pay all his debts in full. The adjudicated cases leave no room for doubt on these points." (*Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; *Halbrook v. Jackson*, 7 Cush. 136, 149; *Barnard v. Crosby*, 6 Allen, 327.) And the same interpretation has been put upon these words in the present bankrupt act, by [196] Judge Nelson, in *Merchants' National Bank v. Traux*, 1 Bank. Reg. 146, and *In re Black and Secor*, 1 Bank. Reg. 81.

Heddens & McDiarmid came within the definition here given of an insolvent at the date of this transaction. They were not only not able to pay their debts in the ordinary course

of business, but they owed debts two or three times greater in amount than the value of all the property they possessed.

The bankrupts were not able to pay their debts in the ordinary course of business as merchants in trade usually do. Suits had been brought on their mercantile paper long overdue, and they had no means to pay their debts, or avert the consequences of a judgment, which would have resulted in an immediate stoppage of their business, by a levy on their stock of goods, except by borrowing, a process which, while it might have furnished a momentary relief, would not have extricated them from their financial embarrassments and ultimate inevitable bankruptcy.

Campbell & Strong knew these facts—indeed it was the knowledge of these facts that prompted them to seek the security their attorneys obtained for them. To know these facts was to know the bankrupts were insolvent, and to confess these facts, and, at the same time, deny knowledge of the bankrupts' insolvency, is simply a denial of the law applicable to the case.

There is another view to be taken of this case, which is equally conclusive against the pretensions of Campbell & Strong.

The rule is well established that a conveyance of the whole of a trader's property, or of the whole, with a colorable exception made to a creditor as a security for a pre-existing debt, is fraudulent and void, not only because he thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but because such a conveyance must either be fraudulently kept secret, or produce an immediate absolute bankruptcy. ^[197] (Deacon on Bankruptcy, 68; Shelford on Bankruptcy, 140, and the English cases there cited; *Ex parte Brennan*, Crabbe, 456; *In re Langley*, 1 Bank. Reg. 155; *Morse v. Godfrey*, 3 Story, 364; *Everett v. Stone*, 3 Story, 346; *Pecham v. Burrows*, 3 Story, 544.)

Here the bankrupts, Heddens & McDiarmid, did convey to one of their creditors the whole of their property to secure a pre-existing debt. They must be presumed to have known the natural consequences of their own acts, and so with Campbell & Strong. They knew of the embarrassments of Heddens & McDiarmid, and they or their agents might have known of their utter insolvency if they had put themselves on inquiry as

they should have done. They could not but have known that this mortgage did give them a preference, which was a fraud upon the bankrupt act. That was the necessary and inevitable consequence of the act, and they must in law be taken to have intended it. The intent to prefer may be inferred from the fact of preference. (*Beals v. Gray*, 13 Gray, 18.)

But this fact is not left to an inference of law. In their letter to their attorneys, Campbell & Strong say: "They (Heddens & McDiarmid) desire to *first* secure us *before* this claim from Cincinnati is put in judgment against them."

Here is the deliberate declaration of Campbell & Strong themselves, that the purpose of this mortgage was to secure them in preference to the Cincinnati creditors. But it is said the mortgage was made to secure future advances, as well as a pre-existing debt.

In answer to this suggestion it is enough to say that the primary object of the mortgage was to secure an old debt; that there was no absolute agreement for advances at all events, but only in the event that the mortgaged property would yield sufficient to pay such advances, after first paying the old indebtedness; that no advances were in fact made, and that if the full sum mentioned had been advanced, it would not have enabled the bankrupts to discharge their debts ^[198] or continue their business, but would still have left some \$6,000 of debts wholly unprovided for.

This is a much stronger case than that of *Pecham v. Burrows*, 3 Story, 544, where Justice Story uses this language: "So that, stripped of its artificial form, we have an indebtedness to the full extent of all their means, to say the least of it, with a possibility of escaping from immediate insolvency and stoppage of their business, only by future credits, to be given to them by the defendant at his pleasure, and those credits avowedly to be given upon the basis of a direct preference over all the other creditors in case of that very insolvency and stoppage of business. It is difficult for me to perceive a clearer case for the application of the act of Congress to conveyances made in contemplation of bankruptcy," etc.

And the supreme court of Massachusetts says: "It does not rebut the intent to prefer, to show that the debtor has also

another motive to the proceeding, namely, an expectation of future benefit to himself, by means of future loans of money, and being enabled thereby to continue his business." (*Denny v. Dana*, 2 Cush. 172.)

Finally, this conveyance is *prima facie* fraudulent and void, because it was not made in the usual and ordinary course of business of the debtors. In determining whether a given transaction is made in the ordinary and usual course of business of a party, "the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. And if it is a departure from his usual and ordinary course of business, the statute intends that the party taking the conveyance from him shall be put upon inquiry." (*Nary v. Merrill*, 8 Allen, 451; *Tuttle v. Truax*, Bank. Reg. 169.)

Independent of this express provision of the bankrupt act, the general rule of law in this class of cases is that the transfer [199] or delivery of property will be considered fraudulent when it is not delivered in the usual course of trade, or of the accustomed dealings between the parties. (1 Deacon's Bank. 609, and cases there cited.)

There is no proof tending in the slightest degree to rebut this *prima facie* case in favor of the plaintiffs. An invoice of the goods, or a single inquiry of Kingsbury, the clerk, would have disclosed all the facts in reference to the bankrupts' property, as they have been disclosed in the evidence on the trial of this cause; and Campbell & Strong cannot escape responsibility by pleading ignorance of facts, the knowledge of which they might have easily acquired by putting themselves upon such inquiry as the law requires of parties in such cases. (*Pecham v. Burrows*, *supra*.)

But it is said this conveyance by the bankrupts was the result of the pressure of Campbell & Strong, and cannot, therefore, be said to have been a voluntary preference on the part of the bankrupts, and that none but voluntary preferences on the part of a bankrupt are fraudulent under the bankrupt act.

This doctrine of pressure has no application under the present bankrupt act. If the trader is insolvent, and he knows the

fact, and one of his creditors knowing that fact "presses" him for payment, and such payment is made, the transaction is clearly a fraud upon the bankrupt act and the other creditors of the debtor.

The trader, knowing himself insolvent and unable to pay all his debts, must know that mortgaging his whole property to one creditor, or paying one creditor in full, will operate to give that creditor a preference over his other creditors, and the law holds every one to intend the necessary result of his act. And it is no answer to such action on the part of a trader to say his creditors "pressed" him, and threatened to sue or attach.

Again, it is a fundamental principle of law that no man shall take advantage of his own wrong. A creditor who, [200] knowing his debtor to be insolvent and unable to pay all his debts, resorts to pressure to compel such insolvent debtor to secure or pay his debt in full, perpetrates a deliberate fraud upon the bankrupt act and the other creditors of the debtor, because it is one of the chief objects of that act to secure an equal distribution of insolvents' estates among all their creditors, and to utterly extirpate the right of preference that existed at common law.

The law would fail of its chief object and purpose if this doctrine of pressure is to be recognized. If the doctrine could be supported under the present act, it would not avail Campbell & Strong in this case, because it certainly could not be held to extend to giving the bankrupt an election to prefer one of half a dozen creditors, all of whom were pressing them with equal vigor. Here the Cincinnati creditors had pressed for payment and been refused, and had resorted to the law to coerce payment of their debts. The assignees of Walton had done the same, and this pressure was prior to that of Campbell & Strong, and was subsisting at the time they obtained their mortgage.

Is the defendant Knapp, who purchased the goods in question from Campbell & Strong, a *bona fide* purchaser, for a valuable consideration, without notice?

Knapp knew at the time he purchased that the bankrupts had failed in business and stopped payment, and that the title of Campbell & Strong and Barnes & Bro. to the goods in ques-

tion was derived from the mortgages executed to them by the bankrupts, and that the bankrupts had no other property, and that these goods were not sufficient to pay their debts. These facts were sufficient to keep Knapp upon inquiry, and he was bound to inquire into and ascertain the true nature of the transaction between the bankrupts and Campbell & Strong. The slightest inquiry would have disclosed facts showing that Campbell & Strong's title was defective.

Knowing facts sufficient to put a man of ordinary care and prudence upon inquiry, and having failed to make inquiry, [201] or take steps to acquire information of the facts for his protection, he is now estopped from claiming that he is a *bona fide* purchaser without notice.

He is not a purchaser for value in the sense of the rule upon this subject. He paid no money for the goods; he executed his notes for the whole amount; has paid no part of the notes. The notes are still in the hands of the payees, Campbell & Strong and Barnes & Bro., and are all overdue, and have lost the incidents of negotiability.

Protection is not given by the rules of law to a party in such a predicament. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities. (*Morse v. Godfrey*, 3 Story, 389; *Willard's Eq. Jur.* 256; 2 *Leading Cases in Equity*, 116.)

All that has been said with reference to the invalidity of the transfer to Campbell & Strong applies with double force to the mortgage made to Barnes & Bro.

Their mortgage was subsequent to Campbell & Strong's, and they took it with full knowledge of the insolvency of Heddens & McDairmid, and with a view to obtain a preference. I think the goods were worth what the defendant agreed to pay Campbell & Strong and Barnes & Bro. for them.

Let judgment be entered for \$3,400, and eight months' interest thereon.

Judgment accordingly.*

* This judgment was pronounced in 1868, and on a writ of error, affirmed by MR. JUSTICE MILLER, at the April term, 1870.

[NOTE. — Since this opinion was delivered, this question of the effect of pressure on the part of creditors has been passed upon by other judges, and the ruling has been uniform that it constitutes no defense. (*Foster v. Hackley & Son*, 2 Bank. Reg. 131, 132; *Wilson v. Brinkman et al.* 2 Bank. Reg. 149, 150; *Graham v. Stark et al.* 3 Bank. Reg. 93; *Giddings v. Dodd*, ante, 115, 116.) As to fraudulent preferences, see *Andrews v. Graves*, ante, 108; *Giddings v. Dodd*, ante, 115; *Linkman v. Wilcox*, ante, 161; *Darby's Trustees v. Boatman's Sav. Inst.* ante, 141; *Vanderhoof's Assignee v. City Bank*, post; *Martin v. Tbof et al.*, post.]

Fraudulent Preference Will Render Preferred Creditor Liable to assignee in bankruptcy. — Followed, *In re Heller*, 3 Biss. 155; *Martin v. Tbof*, post, 211.

[202] APPLETON v. SMITH.

PRACTICE OF SUPREME JUSTICE ON THE CIRCUIT. — The justice of the supreme court sitting alone in the circuit court, will not review and set aside an order or judgment made by the district judge, when the latter was alone holding a term of the circuit court; and MR. JUSTICE MILLER added that he had "prescribed it as a rule of conduct for himself, that the presence of the district judge, and his consent to a review of his decision, would not vary the course to be pursued."

Id. — Accordingly, MR. JUSTICE MILLER, holding the circuit court alone, overruled a motion to quash an attachment levied on goods, solely because a motion involving the same legal proposition was overruled at the preceding term, by the district judge, who then held the court.

Before MR. JUSTICE MILLER.

THIS was an action at law commenced by attachment. A motion was made before MR. JUSTICE MILLER, holding the term, to vacate and dissolve an attachment levied on the goods of the defendant.

Watkins & Rose, for the motion.

Garland & Nash, opposed.

MR. JUSTICE MILLER. — This motion is made upon the ground that the writ was wrongfully issued. Upon looking into the record of the case, I find that the same motion, based upon the same legal proposition, was made at the last term of the court, and was overruled by the district judge, who at that time held the court.

I have repeatedly decided in this circuit, since I was first assigned to it, that I would not sit in review of the judgments and orders of the court, made by the district judges in my absence.

Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the ~~(same)~~ same court to another, and though it is my province in the supreme court, to hear and determine such appeals, I have in this court no such prerogative. The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other.

I have also held, and have prescribed it for myself as a rule of conduct, that the presence of the district judge, and his consent to a view of his decision, will not vary the course to be pursued.

If it were understood that in such case the order of the court would be reconsidered, the desire of the district judge to have the responsibility shared by another, and his natural reluctance to refuse his assent to a rehearing, would always enable pertinacious counsel to get his consent.

For these reasons I decline to consider this motion. Counsel for the motion thereupon withdrew it.

Motion withdrawn.

Note. Practice of Supreme Justice When on Circuit to follow rulings of Circuit and District Judges.—Followed, *United States v. Biebusch*, 1 McCrary, 43; S. C. 1 Fed. Rep. 43.

MARTIN, ASSIGNEE, ETC., v. TOOF, PHILLIPS & CO.*

BANKRUPT ACT—INSOLVENCY—WHAT CONSTITUTES.—The inability to pay debts in the ordinary course of business as merchants in trade usually pay them, constitutes insolvency within the meaning of the bankrupt act.

ID.—KNOWLEDGE OF INSOLVENCY—WHAT IS.—Where a party cannot pay his debts in the ordinary course of business, and knows that he cannot, he will be held to have had knowledge of his insolvency.

* The decree in the above case was on appeal affirmed, by MR. JUSTICE MILLER, at the April term, 1870, on the general ground stated in the opinion of MR. DISTRICT JUDGE CALDWELL.

ID. — FRAUDULENT PREFERENCE. — The necessary effect of a conveyance to creditors in satisfaction either in whole or in part of a pre-existing debt, by one who knows that he is insolvent, [204] is a preference in fraud of the bankrupt act, and he must be held to have intended this as a necessary result of his action.

IGNORANCE OF THE LAW NO EXCUSE. — Ignorance of the law cannot avail creditors who are possessed of facts that show the insolvency of the debtor, and a preference received under such circumstances is fraudulent and void.

TRANSACTIONS OUT OF COURSE OF BUSINESS FRAUDULENT. — Where a transaction that contemplates the securing of a debt is out of the ordinary course of business, the bankrupt act declares it to be *prima facie* fraudulent, and the onus of showing that it is not so is cast upon the defendant.

Before CALDWELL, J.

THE facts appear in the opinion.

Watkins & Rose, for the Plaintiff.

Garland & Nash, for the Defendant.

CALDWELL, *District Judge.* — W. P. Haines & Co., a firm composed of W. P. Haines and C. E. Chetlain, were retail merchants doing business at Augusta, in this State.

On the 29th of February, 1868, they filed their petition praying to be adjudged bankrupts, and on the 22d May, 1868, they were so adjudged, and the plaintiff appointed assignee.

On the 18th day of January, 1868, the bankrupts conveyed to the defendants for the consideration of \$1,876.84, to be credited on a debt due from the bankrupts to the defendants, an undivided half of a parcel of real estate owned by the bankrupts as partnership property. At the same time the bankrupts assigned to F. M. Mahan, one of the members of the firm of Toof, Phillips & Co., a title bond they held for certain other real estate in the town of Augusta, on which the bankrupts had made valuable improvements.

This title bond was assigned to said Mahan for the consideration of \$7,000, also to be credited on the indebtedness of the bankrupts to Toof, Phillips & Co. There were some \$740 of the purchase money still due on said property, and this [205] said Mahan paid and procured a conveyance to himself from one Hough, the owner of the fee of the property.

The plaintiff charges that these conveyances were made in fraud of the bankrupt act; that the bankrupts were insolvent at the time they made them; that they were made with intent to give a preference to the defendants, and that the defendants at

the time said conveyances were made, knew or had reasonable cause to believe the bankrupts were insolvent, and that said conveyances were made in fraud of the bankrupt act. Plaintiff also charges that the assignment of the title bond to F. M. Mahan, one of the defendants, was in fact for the use and benefit of the defendants, and for the purpose of securing the said property or its value to the defendants, in fraud of the rights of the other creditors of the bankrupts, and that this purpose was well known to, and participated in, by said Mahan.

In determining this case, the following inquiries arise:—

1. Was the firm of W. P. Haines & Co. insolvent at the date of these conveyances?

2. Were these conveyances made with a view to give a preference to defendants over the other creditors of the bankrupts?

3. Did the defendants have reasonable cause to believe the bankrupts were insolvent?

1. That the bankrupts were in fact hopelessly insolvent at the date of this transaction cannot be questioned, as will be seen from the following statement of their liabilities and assets:—

Indebtedness of firm at date of conveyance as per schedules on file and referred to in deposition of Haines.....\$55,953 01

Individual indebtedness of members of the firm:—

Chetlain.....	8,850 00
Haines.....	105 00
Total indebtedness at date of conveyances.....	\$59,808 01
Assets of firm as per schedules.....	\$21,851 41
Stone house and lot, say.....	1,800 00
Dwelling-house of each partner, say \$2,000 each.....	4,000 00
	<u>\$27,651 41</u>
Excess of liabilities over assets.....	\$31,656 60

[206] About \$18,000 of the assets consisted of notes and accounts, most of which are shown to be worthless.

Nearly all of the remaining assets, as shown by bankrupts' schedules, consisted of personal property on which defendants held a mortgage, and the real estate embraced in the bankrupts' conveyances to defendants. The stock of goods on hand invoiced as shown by the schedules \$2,600. And this was the condition of the bankrupts' property at the date of the conveyances to the defendants. Chetlain and Frisbie both testify that

the bankrupts sold no goods and did no business after that time.

The indebtedness of the bankrupts is stated by some of the witnesses to have been from \$31,000 to \$35,000. How this discrepancy occurs between the statement of indebtedness by the witnesses and the statement of the indebtedness by the bankrupts in their schedules does not appear, and is not material, as taking either as correct the bankrupts were hopelessly insolvent.

All the bankrupts' indebtedness, with slight exceptions, was in the shape of commercial paper, and with the exception of a debt owing to Walker Bro. & Co., amounting only to some \$1,000, was overdue and unpaid at the date of this transaction.

Creditors had pressed the bankrupts for payment of their debts without result; their stock of goods had been levied on, and their store closed by the sheriff by virtue of an execution issued on a judgment against one of the bankrupts; they had contemplated going into bankruptcy, and during the fall and winter of 1867-68, they only paid (excluding payments to defendants) \$500, on an indebtedness of over \$50,000 then overdue.

The inability to pay debts in the ordinary course of business, as merchants in trade usually do, constitutes insolvency within the meaning of the bankrupt act.

The bankrupts could not pay their debts in the ordinary [207] course of business, and they knew it, and they must, therefore, be held to have had knowledge of their insolvency.

2. Knowing they were insolvent and unable to pay their debts, they conveyed to the defendants a large portion of their property, in part satisfaction of a pre-existing debt.

The necessary effect of this conveyance was to give the defendants a preference, and they must be held to have intended the necessary result of their action.

The witness, Frisbie, says that in the latter part of December, 1867, "I assisted Mr. Haines in making up his balance sheets; the result was that their available assets were not sufficient to pay their indebtedness."

3. The defendants not only had reasonable cause to believe the bankrupts insolvent, but they had actual notice of the fact.

Chetlain, in his deposition, says: "I told Mr. Mahan we could not pay out." And the same witness says that Mahan was in Augusta during the time their goods were levied on, and that they "had an interview with Mr. Mahan on the subject."

And the witness, McCurdy, swears that some time in December, 1867, defendants sent him for collection a note against the bankrupts, that he was unable to collect it, and he then says: "I wrote to Toof, Phillips & Co., that I thought they had better look to their interests, as my conviction was that it was doubtful about their being able to collect their debt from William P. Haines & Co. I think shortly after writing this letter that a representative of the house came round to look after the matter. I think it was Mr. F. M. Mahan."

The defendants, in their answer, say: "It is true, as alleged in said bill, that at the time of the said several transactions, said Haines & Co. owed a large amount of debts, but that they were then insolvent is untrue, but, on the contrary, it is true that at the time aforesaid, said Haines & Co. had available assets in excess of their indebtedness, to the amount ^[2000] of sixteen thousand dollars; that while it is true said Haines & Co. did owe Toof, Phillips & Co., they were desirous to secure their debt, yet they deny they did so, or that they made any effort to secure the same, regardless of the rights of other creditors, but at the time aforesaid said Haines & Co. were not only able to secure said debt of defendants, but also to make good and secure all their other liabilities."

Here is a direct admission of knowledge of the bankrupts' indebtedness, and the averment that the bankrupts were able to "make good and secure their other indebtedness" is fairly tantamount to a confession that they could not pay in the ordinary course of business, as merchants usually do. They had positive knowledge the bankrupts had not done so in their case, but all doubts on this point are put at rest by the defendants' answer to the first interrogatory of the bill, in which they say: "At the time of making of the transfers, defendants do not believe said Haines & Co. were able to pay their debts in money, but they were able to do so on fair market valuation of the property they owned, and of their assets generally, and they were then able to do so."

Here is a direct confession of a fact that in law constitutes insolvency, and it is idle for defendants to profess ignorance of the insolvency of the bankrupts in the face of such a confession. If the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent, and if defendants did not know this constituted insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law, and that ignorance can avail them nothing in this suit; and their denial of knowledge of the insolvency of the bankrupts must, in view of their own confessions and the overwhelming proof in the case, be held to be a denial of the law rather than the fact.

The transactions themselves being out of the ordinary course of business, the bankrupt act declares them *prima facie* fraudulent, and casts on the defendants the *onus* of showing they were not so. They not only fail to rebut this *prima facie* ^[200] case, but their own admissions and the proofs in the case show that the transactions were, in fact, frauds upon the bankrupt act.

The effort to make it appear that the transfer by the bankrupts of their homesteads to Mahan was a *bona fide* transaction, and that it was entered into without any view or expectation that the consideration Mahan was to pay for the property was to apply as a credit on the indebtedness of the bankrupts to the defendants, is negatived by every fact and circumstance appearing in the whole case.

Chetlain swears positively that it was "expressly understood between me and Mr. Mahan that the drafts (Mahan's drafts for the price of the property) should go to our credit." Haines swears to the same effect. The pretense that Haines & Chetlain were at liberty to make what disposition they pleased of Mahan's drafts on Toof, Phillips & Co., for the \$7,000 agreed to be paid for the property, and that their transmission to Toof, Phillips & Co., by Haines & Chetlain, with instructions to place to the credit of Haines & Co., was an agreeable surprise, is too incredible for belief.

It is obvious that these drafts never would have been paid if Haines & Chetlain had transferred them to any other of their creditors, or if they had demanded the money on them. The claim that Mahan made this purchase in good faith in his own

name, and for himself, as "an investment," cannot be supported.

The property which he would have it appear he purchased, as an investment on private account, for \$7,000, to be paid in cash, is shown by the testimony of Chetlain to have been worth only \$4,000, and by the testimony of Hamblet to have been worth only \$3,500, and it is valued by the bankrupts in their schedules at \$4,000, and we may reasonably suppose its value was not under-estimated by them. The property at the same time was subject to a lien of \$740 for the original purchase money. That some inducement other than a desire to make "an investment" must have operated ^[§10] on Mahan to have induced him to give \$7,000 for property worth at most but \$4,000, with an encumbrance on it for \$740, is a conclusion which the mind cannot resist.

What was that inducement? But one answer can be given to this question: it was to secure this property for his firm, on account of the bankrupt's indebtedness to them; and the testimony of the witness, Mahan, must be based rather on the form of the transaction as evidenced by the papers, than on the actual intention and purpose of the parties.

That he expected to pay to his firm \$7,000 in cash for taking up the drafts he drew for the agreed price of this property, I do not believe, nor do I believe he could or would so swear. It is true he says "the amount was charged up to him on the books of the firm." So was the title bond assigned to him and the deed made to him, but equity pays no regard to the forms resorted to by parties, in fraud of the law.

Chetlain and Haines both swear, and every fact in the case shows that the inducement to this purchase on the part of Mahan was to secure the value of this property to his firm; and on the part of the bankrupts, it was to give a preference to the defendants, and to obtain further advances. These advances Mahan promised to make in order to secure these conveyances, but as soon as he obtained the conveyances the defendants refused to make any further sales or advances to the bankrupts.

Mahan admits he "agreed at the same time to continue selling them goods on the usual time, same as we had been doing before, and *we continued to do business with them as usual until*

some time in the following month." If he means to be understood as saying defendants sold the bankrupts' goods on credit, or made any advances to them in any manner, after the date of these conveyances, he is contradicted by the positive testimony of Haines and Chetlain, and by exhibit "A," to his own deposition, which contains a full statement of defendants' dealings with the bankrupts, and shows that defendants did not sell the bankrupts any goods, [211] or give credit to them in any way whatever, after the date of these conveyances.

It must be recollected that in this case the interests, both of the bankrupts and defendants, are adverse to the assignee, for if the plaintiff succeeds it can only be on the ground that the bankrupts made a preference in fraud of the bankrupt act, which would preclude them from obtaining a discharge, and the defendants, of course, are interested to the value of the property. It is not, therefore, very remarkable that they should strive to avoid a conclusion leading to such results. As the evidence shows a state of facts from which the law will infer and declare insolvency and an intent to prefer, it is but fair to presume their denials were intended to repel a charge of actual moral fraud, and they were made in ignorance of the legal effect of their action.

No one who will read carefully the pleadings and proofs in this case can resist the conclusion that this transaction was a bold effort of an enterprising and cunning creditor to possess himself of the bulk of the property of the bankrupts, in fraud of the bankrupt act, and the other creditors of the bankrupts.

The conclusions reached on the law and the facts of this case are fully supported by the ruling of this court in the case of *Rison, Assignee, v. Knapp, ante*, 186, and in the following cases: *In re Black and Secor*, 1 Bank. Reg. 81; *Merchants' Nat. Bank v. Traux*, 1 Bank. Reg. 146; *In re Arnold*, 2 Bank. Reg. 61; *In re Gay*, 2 Bank. Reg. 114; *Haughey, Assignee, v. Albin*, 2 Bank. Reg. 129; *Wilson, Assignee, v. Brinkman et al.* 2 Bank. Reg. 149; *Farrin v. Crawford et al.* 2 Bank. Reg. 181; *In re Randall and Sunderland*, 3 Bank. Reg. 4; *Ahl et al. v. Thorner*, 3 Bank. Reg. 29; *McDonough et al. v. Rafesty*, 3 Bank. Reg. 53; *In re Kingsbury et al.* 3 Bank. Reg. 84; *Graham, Assignee, v. Stark & Others*, 3 Bank. Reg. 93; *Scammon*,

Assignee, v. Cole et al. 3 Bank. Reg. 100; *Campbell, Assignee, v. Traders' Nat. Bank*, 3 Bank. Reg. 124.

The mortgage on the personal property and the prospective crop of the bankrupts, executed to secure the defendants ^[§12] for advances made and to be made to aid in the production of a cotton crop, was executed many months before they were adjudged bankrupts, and so far as the proof shows, before they were insolvent, or the defendants had reason to believe them to be so, and so far as relates to the property mentioned in this mortgage, the bill is dismissed. As to the real estate conveyed by the bankrupts to Mahan and to the defendants, a decree will be entered for the complainant vesting the title of the property in him.

The defendants should be repaid the seven hundred and forty dollars paid out by them to perfect the title of this property and the decree will require the complainant to pay that sum to them after deducting therefrom the reasonable rents and profits of the property during the time they have had the possession. A master will be appointed to take and state the account.

Ordered accordingly.

UNITED STATES v. SMITH.

CONSPIRACY TO RESIST OFFICER. — If client and his attorney enter into a conspiracy to resist an officer, both are punishable.

INDICTMENT FOR RESISTING PROCESS—ACTUAL VIOLENCE. — In an indictment for resisting an officer, actual violence need not be shown.

CALDWELL, J. — If a client and his attorney enter into a conspiracy to resist an officer in performing his duty, both are equally guilty; and in an indictment for this offense it is not necessary to show actual violence; threats and acts intended to terrify, or calculated on their nature to terrify a prudent and reasonable officer, are sufficient, even though he be not prevented thereby from executing his process.

[213] DUPAS v. WASSELL.

PUBLIC LANDS—HOT SPRINGS RESERVATION—PUBLIC POLICY.—Congress specially reserved the tract of land on which the "Hot Springs" were situated from sale, "for the future disposal of the United States," and declared in the act that the same "should not be entered, located, or appropriated for any other purpose whatever." *Held*, that the lands thus reserved became segregated from the public domain, and could not be lawfully settled upon, and that a "squatter" thereon could not recover against his lessee *ground rent* for the use of such lands, because such lease was void by reason of being in violation of the above-mentioned statute, and against public policy, and the lessee was not estopped to deny his landlord's title.

IMPROVEMENTS ON PUBLIC LANDS SALEABLE.—Such a case is distinguishable from those which hold that *improvements* made upon public lands may be sold, and that the sale constitutes a good consideration for a promise to pay therefor. (Per CALDWELL, J., *arguendo*.)

Before DILLON, J., and CALDWELL, J.

THE facts are stated in the opinion of the court.

S. R. Harrington, for the Plaintiff.

C. B. Moore, for the Defendant.

CALDWELL, *District Judge*.—By consent of parties this cause was tried before the court.

The action is brought to recover for the use and occupation of a parcel of ground, comprising part of what is known as the "Hot Springs Reservation." It is not any part of the quarter section of that reservation to which parties have for many years been asserting title by pre-emption, and a New Madrid location.

The plaintiff's own evidence discloses the fact that he has no title, legal or equitable, to the parcel of ground in question, and no pretense of right or claim other than a mere "squatter" on the reservation.

The act of Congress reserving this land from sale (4 U. S. Stats. 505), is in these words: "That the Hot Springs [214] in said territory, together with four sections of land including said springs, as near the center thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever."

The plaintiff "squatted" on this reservation subsequent to the passage of this act. In 1866 the plaintiff assumed to grant a ground lease of part of this reservation to one McGraw, reserving rent at the rate of three hundred dollars per year. The lease was verbal, and McGraw entered upon the land under it, and erected a hotel building. Subsequently the improvements put upon the land by McGraw were sold at execution sale and purchased by the defendant, who entered and occupied the improvements under his purchase at the execution sale.

No rule is better settled than that a tenant shall not, during his possession of premises, be permitted to dispute the title of the landlord under whom he entered. And this rule extends to an under-tenant, or assignee, or other person claiming under the lessee, and is applicable to every species of tenancy, whether for years, at will, or by sufferance. And one who purchases a tenant's right at execution sale is bound by this rule, and is liable for the rent reserved in the same manner as the original tenant.

The plaintiff insists that, applying these rules of law to the facts in this case, he is entitled to judgment. Every agreement that parties may make does not, in law, amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy, are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it.

Leases are not exempt from the operation of this rule. A lease of premises for the purpose of prostitution or for any other immoral object, is a contract against good morals, and absolutely void. (Taylor's Landlord and Tenant, § 511.) And the same is true of leases that contemplate ^[215] the doing of an act in violation of law and the settled public policy of the country. The lease in this cause falls within this last category. The reservation was not *public lands* in the ordinary and common acceptation of these words. These lands could not be entered, located, or appropriated for any purpose whatever. This was the law when the plaintiff "squatted" on them. He was a trespasser, and might have been criminally punished for his trespass. He had no right, and could acquire no right to treat this government property as his own; and in attempting to do so, he was

acting in violation of law; and any lease he may have granted to any portion of the reservation was utterly void.

We have not overlooked the cases of *Pelham v. Wilson*, 4 Ark. 289; *Cain v. Leslie*, 15 Ark. 312; *Hughes v. Sloan*, 8 Ark. 146; *McFarland v. Mathis*, 10 Ark. 560; and other cases of that class, where it is held that parties making improvements on the public lands have title to them which the law will recognize and protect against all the world but the United States; and which they may sell, and a sale of which constitutes a good consideration.

It is not necessary in this case to pass upon the soundness of the rulings in these cases. There are decisions to the contrary. (*Carr v. Allison*, 5 Blackf. 63; and see *Turley v. Tucker*, 6 Mo. 584; and *Hatfield v. Wallace*, 7 Mo. 112.) In the last case cited, one Eiler, who was entitled to a right of pre-exemption to a quarter section of land, under the act of Congress of June 1, 1840, leased the same to the plaintiff for ninety-nine years. The act of Congress under which Eiler was entitled to preempt the land, declared that all transfers of such right made before the issuance of the patents should be void. Judge Scott, in delivering the opinion of the court, said: "I have no doubt about the invalidity of the lease. So bold a contrivance to evade the law ought not to be countenanced, and to enter into an argument to show its invalidity would be treating it with a dignity of which it is altogether unworthy."

[216] The Act of Congress of March 3, 1807 (2 U. S. Stats. 445), prohibits persons from taking possession of, or making settlement on, any of the public lands, or "causing such lands to be thus occupied, taken possession of, or settled," and declares that "such offender shall forfeit all his right, title, and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands which he may have taken possession of or settled or caused to be occupied."

The language of this act is quite as strong as that of 1840, on which the judgment of the court was based in *Hatfield v. Wallace*, *supra*. The lease the plaintiff assumed to make to McGraw is in the very teeth of this act. The sole object of the lease was to induce the lessee to take possession of, and to occupy this government land, and to pay the plaintiff, who was himself a

trespasser, and on the land in violation of law—a ground rent on account of such possession and occupancy.

The rulings in the cases relied on by the plaintiff go upon the ground that it was the policy of the government to encourage settlement and improvements on the public lands; and in these cases the lands on which the improvements had been made were public lands, that is, lands subject to pre-emption, entry, or purchase. But it is not so in this case. By the Act of 1832 this land was segregated from the public domain, and after that time was no more public land in the usual sense of these words, than are the arsenal grounds in this city, or the Fort Smith military reservation.

And in this case there was no lease or sale of *improvements*—it was a *ground lease* of the unimproved lands of the government, reserving a ground rent. To uphold such a transaction would be to invite trespassers on the public lands, and encourage and reward fraud and violence. It would be offering a premium to those who were daring and reckless enough to assume the attitude of landlord over the government lands.

One who assumes dominion over public lands expressly reserved from settlement and sale, as this land was, and invites [217] others to trespass thereon, by presuming to grant them ground leases thereof, stands in a different attitude from a *bona fide* settler on public lands, subject to pre-emption or entry, and whose settlement and improvements are made with a view and expectation of pre-empting or entering the same.

The plaintiff is not within the reason or equity of the cases referred to, and the lease he assumed to make was utterly void, and cannot be the foundation of an action in any court.

DILLON, C. J., concurred.

Judgment for the defendants.

TRIPLETT, ASSIGNEE, v. HANLEY ET AL.

BANKRUPTCY—ATTORNEY'S FEES FOR SERVICES TO BANKRUPT.—The assignee in bankruptcy cannot recover from an attorney the amount of a fee fairly paid to him by an insolvent person for necessary services rendered at the time, there being no fraud in fact, or upon the bankrupt act intended or effected.

ID.—WHEN RECOVERABLE BY ASSIGNEE.—Payments made to an attorney by the bankrupt in contemplation of bankruptcy, for services in opposing the petition of creditors under the thirty-ninth section, will be allowed to stand only so far as consistent with a due regard for the interests of the general creditors.

Before DILLON, J., and CALDWELL, J.

PER CURIAM.—DILLON, *Circuit Judge*, delivering orally the opinion of the court, in substance as follows: This is an action by an assignee in bankruptcy against the defendants, attorneys at law, to recover moneys paid to them by the bankrupts, as fees or for services, in violation or fraud, as alleged, of the bankrupt act.

The defendants rendered services of two kinds.

1. While the debtors were embarrassed and insolvent, and known to be so by defendants, but before the filing of the petition in [218] bankruptcy against them, one of them was arrested under a requisition from another State, and employed the defendants to procure his release by a habeas corpus proceeding, which was successful, and he paid him therefor property alleged to be of the value of seven hundred dollars, but there was no proof or claim that the value of the property exceeded the fair value of the services rendered, and the payment was made before the filing of the petition in bankruptcy. We hold that being a payment for services rendered at the time, and not being shown to be fraudulent or excessive, or intended to withdraw property from the operation of the bankrupt act, or to evade or defeat it, the assignee has not established his right to recover the sum thus paid to the defendants.

2. The other services were these: On the petition in bankruptcy being filed against the bankrupts, who were merchants, they consulted the defendants as attorneys, and agreed to pay, or did pay, them in cash, merchandise, and notes, over fifteen hundred dollars for advice and services in opposing the petition. The bankrupts were known to the attorneys to be hopelessly

insolvent, and to have committed acts of bankruptcy, and they knew, or must be taken to have known, that it was useless to oppose the proceeding, or to incur expense in doing so. We hold that the assignee is entitled to judgment against the defendants for the amount thus paid to them, less the sum of two hundred dollars, that being shown to be a fair compensation for all *necessary* advice, and expenditure, and services; the court regards the allowance of that amount, under the circumstances, just and equitable, but disclaims to lay down any rule on the subject, observing that such allowances must be made with great caution, and a due regard for the interests of the general creditors. (See Bump on Bankr. 3d ed. 195, 368, and cases cited.)

CALDWELL, J., concurs.

Watkins & Rose, for the Assignee.

English & Hanley, for Defendants.

[219] OSBORN v. NICHOLSON ET AL.

SLAVERY—LOCAL INSTITUTION.—The institution of slavery under the constitution of the United States was purely local in its character, and confined to the several States where it existed, and was the creature of positive law, and this is true of all its incidents.

FEDERAL CONSTITUTION—SLAVES NOT PROPERTY.—The constitution of the United States did not regard slaves as property, but as persons; and it did not establish slavery or give any sanction to it, save in the single respect of the return of fugitives from service.

STATUTORY REMEDY—VALID THOUGH AGAINST MORALITY.—A remedy on a contract which is against sound morals, natural justice, and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot for any purpose survive its repeal.

OBLIGATION OF CONTRACT—PROHIBITION BY STATUTE OF SLAVE CONTRACTS.—The new constitution of Arkansas, declaring that "all contracts for the sale and purchase of slaves were null and void," is not in conflict with the clause of the constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, which clause does not operate so as to perpetuate the institution of slavery or any of its incidents, these being matters over which the States had unlimited control.

SLAVE CONTRACTS—EFFECT OF THIRTEENTH AMENDMENT TO THE CONSTITUTION.—

The thirteenth amendment to the Constitution of the United States *ipso facto* destroyed the institution of slavery and all of its incidents, and put an end to all remedies growing out of sales of slaves.

ID.—THIRTEENTH AND FOURTEENTH AMENDMENTS.—In view of the thirteenth and fourteenth amendments to the constitution of the United States, a remedy on a contract for the sale of slaves is contrary to the spirit of their provisions, against public policy, and cannot be maintained.

Before CALDWELL, J.

ON the 28th of March, 1861, the defendant executed to the plaintiff his promissory note for thirteen hundred dollars, and at the same time the plaintiff executed to the defendant a bill of sale in these words: "For the consideration of thirteen hundred dollars, I hereby transfer all the right, title, and interest I have to a negro boy, named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life. I also warrant title to said boy clear and perfect."

[200] The consideration for the note was the negro boy mentioned in the bill of sale, and this suit is founded on this note. To the plea setting up these facts, and the subsequent emancipation of the slave by the abolishment of slavery the plaintiff has demurred, and the question is thus raised whether the plaintiff can recover on a promissory note the sole consideration for which was a slave.

Garland & Nash, for the Plaintiff.

Watkins & Rose, for the Defendant.

CALDWELL, *District Judge*.—On the part of the plaintiff it is claimed that at the date of this contract, slaves were property; that they were so recognized by the constitution of the United States, and the constitution and laws of this State, where the contract was entered into, and that the subsequent abolition of slavery by the thirteenth amendment of the constitution of the United States and the provisions of section 14, article xv., of the constitution of this State, could not affect the vested rights of the plaintiff under the former law.

This is believed to be a full and fair statement of the grounds upon which the right of recovery is rested in this class of cases.

It is assumed that there was not when this contract was entered into, and is not now, as to contracts entered into before slavery was abolished, any distinction between a contract the consideration for which was slaves, and a contract made upon any other consideration.

This is the fatal vice in the argument of those who maintain the continued validity of these contracts. The general rules they lay down with reference to vested rights and the effect of a repeal of a statute upon transactions already concluded, may be sound law, and furnish a rule of decision in cases where they apply, but like most general rules of law, [201] they are subject to exceptions and qualifications. And that they have no application to the extent claimed to this case can be demonstrated by a chain of authorities that no court is at liberty to disregard.

It is obvious that this question cannot be determined without an inquiry into the nature and incidents of slavery, and the relation which the national government sustained, and now sustains to that institution.

That slavery is against the law of God and the law of nature, that slaves were regarded as persons and not property by the constitution of the United States, that it was only within the slave States they were regarded as property, that this *status* was stamped upon them by the local laws of those States and limited to their territorial operation, and that those laws, though expressed in the form of written constitutions and statutes, had in their origin no higher or better sanction than brute force, and were constantly held, even by the courts that enforced them, to be contrary to natural right are propositions established by the judgments of courts and opinions of jurists, whose judgments and opinions must be held to be conclusive upon every court having a decent respect for judicial precedent and authority.

I had supposed that no one denied that these propositions were sound law, but their soundness having been questioned by some judges who maintain that it is still obligatory on the courts to afford a remedy to the slave trader on his slave contracts, a brief reference to the authorities supporting them would seem to be called for.

In 1771 a slave named Somerset was taken by his master from Virginia, then a British colony, to England, and on the

refusal of the slave to return with his master to Virginia, he was sent on board of a ship to be carried to Jamaica and sold as a slave. A habeas corpus was granted against the captain of the ship to bring up the body of Somerset, who was in his possession, in irons, and show the cause of his detention. The case was heard before the king's bench, and in giving [222] the opinion of the court, Lord Mansfield said: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . It is so odious that nothing can support it but positive law." And the court held that the relation of master and slave would not be recognized in any country where slavery did not exist, and that the moment a slave got beyond the operation of the local law which condemned him to slavery, he was free. This decision, pronounced a century ago, has remained the law of England. It was reaffirmed with emphasis in 1824, by the court of queen's bench.

A British merchant residing in Florida, when it was a Spanish province, and slavery existed there, owned certain slaves who escaped and went on board a British vessel lying off the coast of Florida. The master of the slaves pursued them and demanded their return from the officer in the immediate command of the vessel. That officer refused to return the slaves or to compel them to leave the ship, and the owner afterwards brought suit against him in England for the value of the slaves. Holroyd, J., in the course of his opinion, says: "Now it appears from the facts of the case that the plaintiff had no right in these persons except in their character of slaves, for they were not serving him under any contract, and according to the principles of the English law such a right cannot be considered as warranted by the general law of nature. I am of opinion that according to the principles of the English law, the right to slaves, even in the country where such rights are recognized by law, must be considered as founded not upon the law of nature, but upon the particular law of that country." And in the same case, Chief Justice Best says: "The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where undoubtedly the laws of the country would prevail), those persons who before had been slaves, were free."

It was urged in this case that the plaintiff was a British subject, ^[233] that the slaves carried off by the defendant were property according to the law prevailing in Florida, and that though slavery might not exist in England, the comity of nations required that the courts of that country should afford him redress for the loss of his property. In answer to this claim, the same learned judge says: "The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates*, but it is a maxim that that cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God." And the court, holding that slavery was contrary to the law of nature and the law of God, the defendant had judgment. (*Forbes v. Cochrane*, 2 Barn. & C. 448; S. C. 9 Eng. Com. Law, 199.)

In Phillimore's International Law, a work of undoubted authority, it is said: "There is a kind of property which it is equally unlawful for States as for individuals to possess—property in men. A being endowed with will, intellect, passion, and conscience, cannot be acquired and alienated, bought, and sold by his fellow beings like an inanimate or an unreflecting and irresponsible thing. The Christian world has slowly but irrevocably arrived at the attainment of this great truth, and its sound has at last gone out into all lands, and its voice unto the ends of the world. By general practice, by treaties, by the laws and ordinances of enlightened States, as well as by the immutable laws of eternal justice, it is now indelibly branded as a legal as well as a natural crime." Again he says: "If the movable property of the subjects of a State finds its way within the limits and jurisdiction of a foreign state, it may be claimed, and must be restored to the lawful owners. In parts of the American continent, slaves are unhappily by municipal law considered as chattels or movable property; a slave escapes or arrives in this country where slavery is illegal, he is claimed by his master—must he be restored? Unquestionably not; upon what grounds? Upon the grounds that the *status* of slavery is contrary both to good morals and to fundamental policy." (1 Phillimore's International Law, 242, 316, *et seq.*)

^[234] The doctrine established by the English cases is also the law of France. (1 Phillimore's International Law, 258, 341.)

And it has been recognized by the courts of this country to its fullest extent.

In the case of *Rankin v. Lydia*, Judge Mills, speaking for the court of appeals in Kentucky, says: "In deciding the question (of slavery), we disclaim the influence of the general principles of liberty, which we all admit, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by positive law, of a municipal character, without foundation in the law of nature, or the unwritten and common law." (2 Marsh. A. K. 468.)

In the case of *The Antelope*, 10 Wheat. 13, Chief Justice Marshall says: "That it (slavery) is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted, and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of the admission."

In *Dred Scott v. Sandford*, 19 How. 624, Mr. Justice Curtis says: "Slavery being contrary to natural right is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but it is inferable from the constitution, and has been explicitly declared by this court. The constitution refers to slaves as 'persons held to service in one State, under the laws thereof.'" Nothing can more clearly describe a *status* created by municipal law.

In *Prigg v. Pennsylvania*, 10 Peters, 611, this court said: "The state of slavery is deemed to be a mere municipal regulation founded on, and limited to, the range of territorial law." And in the same case Mr. Justice McLean says: "The civil law throughout the continent of Europe, it is believed, without an exception, is that slavery can exist only within the territory where it is established; and that if a slave escapes, [235] or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation." (*Prigg v. Pennsylvania*, 10 Peters, 634.) And the same learned judge, in speaking of the relation which the national government bore to slavery in the States, says: "Slavery is emphatically a State

institution.” And in answer to the suggestion that section 9 of the State constitution, that provides “that the migration or transportation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year 1808,” was a constitutional recognition of the nationality of slavery, he says: “The provision shows clearly that Congress considered slavery a State institution, to be continued and regulated by its individual sovereignty, and to conciliate that interest the slave trade was continued twenty years, not as a general measure, but for the ‘benefit of such States as shall think proper to encourage it.’” Two years before the expiration of the time allowed for the continuation of the slave trade had expired, Mr. Jefferson, in his message to Congress, used this language: “I congratulate you, fellow citizens, on the approach of a period at which you may interpose your authority, constitutionally, to withdraw the citizens of the United States from all participation in the violation of human rights, which has been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of the country have long been eager to proscribe. Although no law you can pass can take the prohibitory effect until the first day of the year 1808, yet the intervening period is not too long to prevent by timely notice expeditions which cannot be completed before that day.”

And no sooner had the right reserved by the slave States to continue this infamous traffic expired, than Congress passed an act declaring the slave trade piracy to be punished with death. And it was only by virtue of the third section of article iv. of the constitution of the United States, that fugitive ^[226] slaves could be apprehended in the free States and returned to their masters.

And this provision of the constitution was limited strictly to the case of a person “escaping,” and hence the courts uniformly held that if a master voluntarily permitted his slave to go into a free State, or attempted to travel with his slave through a free State, the slave was a free man the moment he entered the free State. (*Commonwealth v. Aves*, 18 Pick. 193; *Lemmon v. People*, 26 Barb. 270; *People v. Lemmon*, 5 Sandf. 681; S. C. 20 N. Y. (6 Smith) 562; *Dred Scott v. Sandford*, opinions of Jus-

tices McLean and Curtis, and cases there cited; *Jones v. Vanzandt*, 2 McLean, 596; *Forsyth et al. v. Nash*, 4 Mart. (La.) 385; *Ex parte Simmons*, 4 Wash. C. C. 396.)

That slavery existed in the States independent of the constitution must be admitted, but that that instrument gave any sanction to slave contracts, or that slavery derived any support from that instrument, save in the single particular already mentioned, is not true; and that it was contrary to the genius and spirit of our institutions and the fundamental principle upon which our government was founded, will scarcely be denied.

We know that the States might destroy property in slaves, without compensation, by repealing the laws by which slavery was established, and we have seen that the right of property in slaves was lost the moment they were taken beyond the territorial operation of the laws that made them such. Now this was not, and is not, the case with any other species of property. No State could deprive its citizens of the right of property in their horses and cattle, without making compensation, and no State can deny to citizens of other States the right to bring such property, or any other species of property, with them, into such State. Crossing State lines does not affect the title to movable property of any kind. This right of every citizen to dwell in or pass through any State in the Union, with his movable property, is guaranted by the constitution of the United States, and exists by the law of nations. But ^[227] no such right obtained by the constitution of the United States, or the law of nations, with reference to slaves.

The right to movable property, and the rights growing out of contracts in reference to such property, are recognized and upheld by the common law of nations. But this Code of universal obligation, securing to the owner his movable property in every State, and securing to all the rights growing out of contracts in reference to such property, has no application to slavery, and the rights growing out of it.

The comity of States and nations does not demand the enforcement of slave contracts any more than it demands the recognition of the claim of the master to his slave, and the law of nations, and the common law, deny all remedy on contracts and rights claimed by virtue of the slave code in courts of free

States. (*Forbes v. Cochrane*, 2 Barn. & C. 448; Story's Conflict of Laws, §§ 96, 242, 244, 259; *Greenwood v. Curtis*, 6 Mass. 361, opinion of Judge Sedgwick; Sedgwick on Stat. and Const. Law, 72, 73, 88, and note.)

A contract growing out of the sale of slaves depends for its force and validity on the laws of the State where it is made, and to be performed. In this respect it is not different from other contracts, but here the analogy ceases.

A slave contract may be valid by the laws of the State where it is made, and while those laws continue it may be enforced, but there is no obligation resting on any free State to afford a remedy on such contracts. Nor was any such obligation imposed on the free States by the constitution of the United States. In *Commonw. v. Aves*, 18 Pick. 193, there is an *obiter dictum* to the contrary. But this *dictum* is referred to by Judge Story, in note 5 to section 259, of his Conflict of Laws, in language that does not indicate approval; and it is in conflict with the text of that author, and the learned opinion of Judge Sedgwick in *Greenwood v. Curtis*, 6 Mass. 361, and see opinion of Justice Nelson, 19 How. 459, *et seq.*

The constitutional inhibition against State laws impairing [228] the obligation of contracts is not limited in its operation to laws impairing the obligation of contracts, made and to be performed within the State. The law of the contract—the obligation of the contract—remain the same, and will be the same everywhere, and will be the same in every tribunal. But it does not follow that the constitution compels this State to enforce every species of contracts made in foreign states or other States of this Union, or in this State.

Neither the national nor the State courts will enforce contracts against good morals, or against religion, or against public right, nor contracts opposed to our national policy or national institutions. Such contracts will be deemed nullities by the courts of this country, although they may be deemed valid by the laws of the place where they are made. (Story's Conflict of Laws, §§ 244, 259, 326–328, 336, 337.)

“The law of the place where the thing happens does not always prevail. In many countries a contract may be maintained by a courtesan for the price of her prostitution, and one

may suppose an action to be brought here upon such a contract, which arose in such a country, but that would never be allowed in this country." (*Robinson v. Bland*, 2 Burr. 1084.)

Now slavery contained in itself all the worst social evils, and the sale of female slaves for purposes of prostitution was only one of its many revolting features.

Will any one be so bold as to affirm that a slave contract entered into in a foreign country, and valid by the laws of that country, would now be enforced by the courts of this country, either State or national? And if not, why not? Obviously because such a contract is against sound morals, and natural right, and opposed to the constitution and policy of our government. Now is there anything in our constitution and policy to-day by which the domestic slave trader is put in any better position before the courts of the country than the foreign slave trader would occupy?

It is said slavery was once lawful in some of the States of [229] the Union, and was tolerated by the constitution of the United States. Granted. But it has been abolished by the constitution of the United States and of the several States, and that abolishment has been followed up by acts for the enfranchisement of the former slaves, and other legislation that indelibly stamp slavery and all contracts and rights based on the slave code as illegal and void.

In *Lemmon v. People*, 20 N. Y. (6 Smith) 562, it was argued that the State of New York had once tolerated slavery, and that a simple abolishment of that institution by the State ought not to be held or construed to preclude a citizen of a slave State from passing through that State with his slaves. In answer to this argument the court says: "It cannot affect the question that at some time in her history she has tolerated slavery. Without regard to time or circumstances, the State may at her will change the civil condition of her inhabitants and her domestic policy, and proscribe and prohibit that which before had existed." (*Lemmon v. People*, 20 N. Y. (6 Smith) 617.)

It is the *status*, the unjust and the unnatural relation which the policy of the State aims to suppress, and her policy fails, at least in part, if the *status* be upheld at all. (*Lemmon v. People*, 20 N. Y. (6 Smith) 630.)

If the slave code be now upheld and enforced for any purpose whatever, save as to matters "commenced, prosecuted, and concluded," whilst it was in force, do we not give effect to a policy opposed to the letter of our constitution and laws, and to their spirit and avowed policy? By the comity of nations we shall be forced to open our courts to the foreign, if we open them to the domestic, slave trader. We can open them to neither. In *Greenwood v. Curtis*, 6 Mass. 361, Judge Sedgwick says: "If the contract on which a remedy is sought be unrighteous or immoral, either in its consideration or its stipulations, judgment must be rendered for the defendant unless the court be concluded by positive authority operating in favor of the plaintiff." And this positive authority in such cases must be in force at the time the plaintiff seeks his judgment.

[200] The plaintiff in this case is seeking to enforce in this court a contract growing out of the sale of slaves, after slavery has been abolished by the constitution of the United States, the slave code repealed, and such transactions made infamous and criminal by the laws of the land.

It was only by virtue of the slave code of the State, that the plaintiff ever could have maintained an action in any court on this contract. The common law would afford him no remedy, and the statute giving the remedy having been repealed by the article xiii. of amendment of the constitution of the United States, he is without remedy.

In *Key v. Goodwin*, 4 Moore & P. 341, 351, Lord Chief Justice Tindal said: "I take the effect of a repealing statute to be to obliterate it as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." In *Surtees v. Ellison*, 9 Barn. & C. 752, Lord Chief Justice Tenterden said: "It has long been established that when an act of parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule, and we must not destroy that by indulging in conjecture as to the intention of the legislature. We are therefore to look at the statute, 6 Geo. 4, ch. 16, as if it were the first that had ever been passed on the subject of bankruptcy."

And in Dwarries on Statutes, 676, the rule is laid down in these words: "When an act of parliament is repealed, it must be considered, except as to those transactions passed and closed, as if it never existed."

In *Butler v. Palmer*, 1 Hill, 324, 332, Mr. Justice Cowen, after quoting approvingly the rule laid down by Lord Chief Justice Tindal, in *Key v. Goodwin*, says: "It will be perceived that the rule laid down in this and several other cases has no respect whatever to the circumstances that the repealed statute was either of a criminal or of a jurisdictional character. [231] Nor is it perceived why in case of a civil right an exception is not just as practicable in favor of a jurisdiction given to enforce the right, as of the right itself." And see opinion of JUSTICE MILLER, in *Steamship Co. v. Joliffe*, 2 Wall. 450, and cases there cited.

While a remedy on a contract against sound morals and natural justice and right, may be given by the force of a positive law, under which it was made, and though an action may be maintained on such a contract while such law remains in force, no remedy can be given on such a contract after the repeal of the statute giving the same, and by virtue of which alone the contract ever had any validity.

The rule here laid down does not conflict with the doctrine of the supreme court in *Steamship Co. v. Joliffe*, *supra*. The distinction is between things lawful or indifferent, and things unlawful and immoral. Contracts authorized by a statute which are in themselves lawful, or at most indifferent, and which the parties might have lawfully entered into at common law, independent of the statute, and on which the common law would have afforded a remedy, may be enforced after the repeal of the statute under which they were made.

The common law in such cases affords a remedy. But if a statute recognizes the validity of, and gives a remedy to enforce, a contract which by the common consent of the whole civilized world is regarded as a violation of the law of God and the rights of man, the repeal of such a statute takes away all remedy on such contract.

It cannot be enforced under the statute because the statute is repealed, and the common law will not afford a remedy on such

a contract. "It is an undoubted principle of the common law that it will not lend to its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate by improper influences, the integrity of our social or political institutions. (*Marshall v. B. & O. R. R. Co.* 16 How. 314, 334.)

[233] In *Jones v. Vanzandt*, 2 McLean, 596, 603, which was an action brought to recover the penalty given by the fugitive slave law of 1793, for harboring and concealing a runaway slave, Mr. Justice McLean says: "It is clear that plaintiff has no common-law right of action for the injury complained of. He must look exclusively to the constitution and act of Congress for redress."

And when a penalty accrued under the same act, and suit was brought therefor, and was pending when the act was repealed, by the Act of 18th September, 1850, the supreme court said: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter." (*Norris v. Crocker*, 13 How. 429.)

In *Kauffman v. Oliver*, 10 Barr. 514, it was held that no action could be maintained at common law for harboring runaway slaves, or for aiding them to escape from their owners. And trover would not lie at common law for a negro slave, because by the common law it was said one man could not have a property in another, for men were not the subject of property. (2 Kent Com. 283, *et seq.*)

The law on this subject is forcibly and succinctly stated by Judge Curtis in his opinion in *Dred Scott v. Sandford*, 19 How. 625, in these words: "And not only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that *status* must be defined, protected, and enforced by such laws."

The rule here laid down is stated with great clearness by Justice Nelson, in *Kimbro v. Colgate*, 5 Blatchf. 229, 231. By virtue of the fourth and fifth sections of the Act of March 3, 1863, there accrued to the plaintiff a right of action to recover back certain sums of money paid by him to the defendant.

After the money was paid and the right of action had accrued, the act giving the remedy was repealed. This was not an action for a penalty or forfeiture. To bring his case within the saving clause of the repealing statute, the plaintiff contended that it was a "proceeding to recover a sum of [200] money in the nature of a penalty or forfeiture." In answer to this, the learned judge says: "I cannot, however, so regard it. The cause of action, as stated in the declaration, is predicated upon a right to recover a sum of money paid by the plaintiff to the defendants; and for aught I see *indebitatus assumpsit* for money paid would have been as appropriate a remedy as the special count to which the defendants have demurred." And on the point of the effect of the repeal of the statute he says: "As the money was paid under a contract made in violation of law, there is no ground for the recovery of it back, upon the principles of common law; and as the statute which gave the remedy has been repealed, the cause of action and the suit must, upon established principles, fall with the repeal."

Nor must it be forgotten that the repealing statute in this instance emanates from the highest power known in our form of government, and is part of the organic law of that government. Hence there can be no question of the constitutional power of repeal, and no objection urged, that the right did not reside with the power that effected the repeal to annihilate slavery and all its incidents, and all rights and obligations growing out of it.

The plaintiff's action must fail on another ground. The rule that a contract made and to be performed in a certain country derives its character and obligation from the laws of that country, is not better settled than that such contract may be dissolved by the laws of that country. And but for the limitation on the powers of the States in this respect, the States of the Union would have possessed the power to dissolve all contracts made and to be performed within their jurisdiction. But the limitation on the States in respect to this power is not absolute and universal in its application. States may pass insolvent laws under and by virtue of which the obligation of contracts subsequently entered into and to be performed in such States may be discharged.

And it is now the settled law that States prescribe and ^[224] declare by their laws prospectively, what shall be the obligation of all contracts made within them. The contracts designed to be protected by the clause of the constitution in question are, "contracts by which perfect rights—certain, definite, fixed private rights of property—are vested," and not those rights growing out of measures or institutions adopted, undertaken, or affected by the body politic, or State government for the benefit of all, and which from the very necessity of the case, and by common consent, are to be varied, discontinued or created, as the public good shall require. In such matters, this court has said that the extreme of abuse "would appear to exist in the arraignment of their control over officers and subordinates, in the regulation of their internal and exclusive polity, and over the modes and extent in which that polity should be varied to meet the exigencies of their peculiar condition. Such an abuse would prevent all action in the State governments, or refer the modes and details of their action to the tribunals and authorities of the federal government. These surely could never have been the legitimate purposes of the federal constitution." And it was held that the legislature might abridge the term of an officer without any conflict with the constitution of the United States. (*Butler v. Pennsylvania*, 10 How. 416.) So that it is far from being true that States are bound in all cases to enforce contracts made within them, according to the literal terms of such contracts.

And now let us inquire whether the constitution of the United States takes from a State the power to determine at any time the force and validity to be given to slave contracts made and to be performed in such State. Obviously if it shall be found on investigation that the constitution of the United States treated slaves as persons and not as property, and left the institution and traffic in slaves and all rights growing out of that traffic to the States themselves, giving no sanction to anything connected with the institution, excepting so far and so long as the States themselves gave that sanction, ^[225] then such contracts and rights based on, or growing out of that institution, may be discharged by State laws, the same as though there was no inhibition on the States to pass laws impairing the obligation of contracts.

The power of Congress to regulate commerce with foreign nations and among the several States, and with the Indian tribes (§ 8, art. i.) is plenary and exclusive. This power extends to the carrying of persons as passengers, and to every species of property that may lawfully become the subject of traffic and commerce among men.

In 1832, the State of Mississippi adopted a constitution which prohibited the introduction of slaves into that "State as merchandise, or for sale."

In *Groves v. Slaughter*, 15 Peters, 449, it was contended by Mr. Webster that this provision of the constitution of Mississippi was in conflict with that provision of the constitution of the United States which confers on Congress the power to regulate commerce between the States. And in his argument of that case he says: "The constitution recognizes slaves as property. The court is called upon to say that the State of Mississippi may prohibit the transportation into that State of any particular article. The court will be obliged to find out something in the introduction of slaves, different from trading in other property." And he contended that if the State of Mississippi could prohibit the introduction of slave property within her limits, Massachusetts might prohibit the introduction into that State, of cotton raised in Mississippi. Mark the answer given to this argument. Mr. Justice McLean, speaking for a majority of that court, says: "By the laws of certain States, slaves are treated as property, and the constitution of Mississippi prohibits their being brought into that State by citizens of other States, for sale, or as merchandise. Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the States as merchandise, that cannot [200] divest them of the leading and controlling quality of persons, by which they are designated in the constitution. The character of property is given them by the local law. . . . Could Ohio, in her constitution, have prohibited the introduction into the State of the cotton of the south, or the manufactured articles of the north? If a State may exercise this power it may establish a non-intercourse with other States. This, no one will pretend, is within the power of a State. Such

a measure would be repugnant to the constitution, and it would strike at the foundation of the Union. . . . But whilst Ohio could not proscribe the productions of the south, nor the fabrics of the north, no one doubts its power to prohibit slavery. . . . The power over slavery belongs to the States respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it. Each State has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population." And Chief Justice Taney in the same case, says: "In my judgment the power over the subject (slavery) is exclusively with the several States."

The grant of power to Congress to regulate commerce between States extends to every species of property that may lawfully become the subject of traffic and commerce, and the grant is plenary and exclusive. Now if slave property was excepted from the operation of this power, on the ground that the power over that subject was exclusively with the several States, upon what principle of logic or rule of construction can it be claimed that the constitution of the United States throws its protecting shield over the slave dealer, and the contracts growing out of that traffic? Is not the grant of power to Congress to regulate commerce between the States as full and absolute as the prohibition to the States to pass laws impairing the obligation of the contracts? and if slave property is not embraced in the one case, neither are slave contracts embraced ^[237] in the other; but both alike are matters of State regulation.

In *Jones v. Vanzandt*, *supra*, Justice McLean says: "The constitution treats slaves as persons." The view of Mr. Madison, "who thought it wrong to admit in the constitution the idea that there could be property in men," seems to have been carried out in that most important instrument.

"In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the constitution." (Justice McLean, in *Scott v. Sandford*, 19 How. 537.) In the same case, Mr. Justice Nelson says: "Except in cases where the

power is restrained by the constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction. . . . Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois, within her territories, on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her." (*Scott v. Sandford*, 19 How. 459.)

And this doctrine was carried to a great length in this case, as we shall see. Dr. Emerson, while the owner of Dred Scott, took him from Missouri to Wisconsin, where he at once became a free man, and was lawfully married, and children were there born of that marriage. Afterwards Scott was brought back within the State of Missouri, and the supreme court of that State, and a majority of the judges of the supreme court of the United States held that, under this state of facts, Scott was not entitled to his freedom, on the ground that slavery was purely a matter of State regulation, and that one State was not bound to give effect to the laws of another State, as to slavery, and that there was no constitutional power in the government of the United States to control a State in this regard. The effect of this holding was to dissolve a lawful marriage, and bastardize the legitimate issue of that marriage.

[238] Against this result Justice Curtis protested with great energy. He said: "And I go further; in my opinion, a law of the State of Missouri, which should thus annul a marriage lawfully contracted by these parties, while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the constitution of the United States. . . . And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to married persons, as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduced them to slavery." (*Scott v. Sandford*, 19 How. 600, 601.)

But a majority of the court maintained that the right of the State of Missouri over the subject of slavery within her borders

was supreme, thus, in effect, holding that this right was paramount to the obligations of a marriage contract.

Now if this power of the States over the institution of slavery was so absolute and uncontrollable as to authorize them to destroy the obligation of the most sacred contract known in civil society, in the interest of slavery, it would be strange, indeed, if they did not possess the power to annul slave contracts in the interests of freedom, humanity, and morality. It is a pleasing reflection to know that the law laid down in this celebrated case, and which was believed by many to be at variance with the rights of freedom, can now be quoted in support of, and is a full authority for, the "rights of the States" to abolish slavery, and obliterate all contracts relating to it.

These authorities abundantly establish the proposition that slavery was a local and not a national institution, that the States possessed plenary powers over the whole subject, and all rights and obligations growing out of it—that it might be introduced or excluded, established or abolished, the introduction and sale of slaves from other slave States encouraged or prohibited, and the constitution of the United States had no bearing on the institution, and gave no validity to the traffic ^[239] in slaves, or obligations growing out of that traffic, nor in any other manner recognized it, save in the single matter of returning those who should escape into free States. The fugitive slave law was passed to carry into effect this provision of the constitution, and with the passage of that act the constitutional power of the national government in the interest of slavery, or any right growing out of it, was exhausted.

This State in the exercise of her undoubted rights over the institution of slavery, and all its incidents, has by her constitution abolished the institution, and declared that "all contracts for the sale and purchase of slaves are null and void." (§ 14, art. xv. Constitution of Arkansas.)

This is the end of the plaintiff's case. Both parties to this contract must be held to have entered into it with the full knowledge of the plenary powers of the State over the object-matter of the contract.

In reference to contracts of sale, bills of sale, mortgages, and notes given for slaves, there was an implied condition attached

to all such contracts, that the laws of the State that gave the right might also dissolve it. This was implied as fully as it is implied that the obligation of contract made and to be performed within a State may be discharged under the operation of an insolvent law of that State in force at the date of making such contract. Take the case of a mortgage upon slaves, and there were many, at the time slavery was abolished. A mortgage is a contract, and of as high an obligation as any other contract. Now what becomes of the obligation of such a contract after the State in which the mortgaged slaves were found abolished slavery?

Does the prohibition against impairing the obligation of contracts extend to such a case? Is the mortgage still valid and binding, and are the slaves embraced in it excepted from the operation of the constitutional provision abolishing slavery? It must be so, if that clause of the constitution was intended to protect and uphold, despite the action of the States, contracts and rights growing out of slavery. Again, take the [240] case of a contract for the hire of slaves, or a contract for the sale and delivery of slaves at a future time, or a note, payable in slaves. What becomes of the obligation of the contract in all these cases? Obviously it is impaired, and if the position assumed is a sound one, the act of the State in abolishing slavery—as to the slaves embraced in such contracts—must be held unconstitutional and void, because the direct and inevitable effect of it would be in the cases supposed to impair the obligation of contracts. Yet we know no such consideration would be admitted to control or limit the right of a State to deal with this institution.

It must not be forgotten that this question must be determined under the constitution of the United States, as it stands now. What are its provisions? “Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” (§ 1, art. xiii., Amend. Const.) “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privi-

leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (§ 1, art. xiv., Amend. Const.)

Now, with such provisions in the constitution of a republic where every human being is free, would it not be a strange anomaly if there existed in that constitution a principle that would coerce the States to open their courts to the slave dealer, and let him recover therein the fruits of his barbarous traffic? No such principle ever did exist in reference to such cases, but if there had been, it would have been repealed and superseded by the thirteenth and fourteenth amendments above quoted. These amendments are of paramount authority.

[241] In *Johnson v. Tompkins and others*, Bald. 598, Mr. Justice Baldwin, after quoting the language of the constitution, that "this constitution and the laws which shall be made in pursuance thereof shall be the supreme law of the land," says: "An amendment to the constitution is of still higher authority, for it has the effect of controlling and repealing the express provisions of the constitution itself."

These amendments are the work of the sovereign people of the United States. There are no technical rules to obstruct or prevent their full operation presently on all persons, matters, and things within their scope. Obligation of contracts and vested rights, based on slavery, cannot be set up to impede or restrain their operation. And no one can escape from their operation by the cry of the "constitution as it was."

A court can only reply, that under the constitution as it is, slavery and slave contracts are outlawed, and that no clause of that instrument protects or upholds either. If the vicious principle contended for ever did lurk in the clause of the constitution relied upon, it has been extracted therefrom by these amendments.

While the prohibition on the States to pass laws impairing the obligation of contracts may not be restricted in its operation to contracts recognized to be of universal obligation, it is clear that it was never intended to sanction slavery, or operate to restrict or embarrass the powers of the States over that institution

and its incidents. We have seen that its application to slave contracts would result in a prohibition upon the States from emancipating all slaves, when and so long as such slaves were held under mortgage, or other lien, arising out of a contract. For in a mortgage, the pledge of the property is the very essence of the contract, and the right to subject the property pledged to the payment of the mortgaged debt is the obligation of that contract. More than half of the slaves of the south were thus pledged at all times, and if this clause can be invoked to uphold slave contracts, there never was a [249] time when it might not have been successfully appealed to by the States to stay emancipation.

It may be hazardous to except any species of contract from the operation of that provision. I grant that it is; but it must be construed in the light of all other provisions of that instrument, and made to harmonize with them, and when so construed it cannot be held to be a prop to slavery and a shield to slave traders. The fear expressed that this construction will tend to weaken the benign influence of this clause over the erratic and sometimes unjust action of States in their attempts to relieve themselves, or their citizens, from the obligation of their contracts, is not well founded. Slavery was emphatically *sui generis*, and the most astute lawyer will be unable to find its analogy under our constitution.

Let us next inquire as to the legal effect of these amendments on slave contracts, viewed independently of State enactments. These amendments were the result of the exercise by the people of the United States of their own proper and acknowledged sovereignty, for the purpose of restoring the slaves to their natural rights, and conforming the institutions and laws of the republic and of the several States to the immutable laws of eternal justice, and making the fact conform to the theory upon which our form of government is based.

By these amendments a living force and vitality were imparted to the words of the declaration of independence, "that all men are created equal"; and to that clause of article v. of the constitution of the United States, which declares that, "no person shall be . . . deprived of life, liberty, and property without due process of law."

The effect of these amendments cannot be limited to the mere severance of the legal relation of master and slave. They are far-reaching in their results. Under them the former slave is now a citizen, possessing and enjoying all the rights of other citizens of the republic.

Can any one doubt that it was the object and purpose of [243] these amendments to strike down slavery and all its incidents, and all rights of action based upon it?

Could it have been intended that free citizens should still be the subject-matter of litigation in the courts of justice, as chattels? In the case before the court, as in most other cases of the sale of slaves, there is a warranty that the slave is sound in mind and body. If this court takes jurisdiction of this case, the defendant has a right to set up a breach of that warranty as a defense, and this court, in the trial of such an issue, must inquire into the mental and physical condition of a citizen of the republic, with a view of ascertaining his value as a chattel. And it may chance that the subject of this inquiry is a juror or officer of the court, and indeed it might occur that the judge on the bench would be the subject of such an inquiry. The mind revolts at the trial of such an issue. It would be giving full force and effect to one of the most obnoxious features of the slave code. It would be placing the free man, who may be the subject-matter of such a suit, in an attitude before the court and the country that no free government will permit, jealous of the rights and honor of its citizens, and whose policy is to instil into their minds a love of country and its free institutions. The government that would permit its free citizens to be thus degraded in the interest of slavery and slave traders, would be unworthy of the name of a free republic.

The courts are daily in the habit of denying a remedy on contracts because they are against public policy. In such cases the good of the community at large is taken to be of more importance than the claim of the individual, and the latter must perish when it conflicts with the common welfare of society, in which that of the claimant is likewise involved. The courts, under such conditions, are often compelled to arbitrate between these opposing claims, without any distinct and articulate legislative rule; they must of their own knowledge decide whether

public policy in the given case is materially affected, and give their judgment accordingly. In this case, ^[244] however, the court is not under the necessity of resorting to its own knowledge of the tendency of the act in question. The thirteenth amendment carries with itself the denunciation of slavery in every form; and that as plainly as if the mischief to be remedied thereby had been expressly recited, and the tendency of slavery openly denounced. We may safely say that all the reasonable premises of the amendment are embraced by implication in its language; that it does in the same manner declare that slavery is unjust, and not for the best interest of the nation. As there is no exception, slavery is condemned in all its features. It is well known that among these, the sale of slaves, with the consequent breaking up of families, was considered as amongst the most odious. Is it possible, therefore, to hold that this, of the whole institution, alone survives the general destruction, and that the courts are still to guard this relic of a condemned system by adjusting the balance of justice between the buyer and seller under such painful and exasperating circumstances? and this, when the evil policy of slavery, in all its parts and functions, has been so authoritatively declared? Whether this remedy were once good, by positive law, is no longer a pertinent question, when all the surroundings have been so changed as to have changed the fundamental law of the United States, and of every State where slavery was once tolerated. Public policy does necessarily change with the change of the conditions of society, which is no more an objection to this branch of the law than it is to any other. The law is not a set of dead rules, incapable of expansion or growth to meet the altered needs of society. The courts must pass on these questions as on practical affairs of life, vital in the actual present; and the courts will not stultify themselves by declining to adjudicate in reference to these, and to these alone; as was properly held in the great case of *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 144, 196, 229, *et seq.* That a change in the fundamental law and policy of the government does necessarily operate to destroy the obligation of contracts and rights ^[245] of action depending for their validity and enforcement on a law and policy inconsistent and incompatible with the last declared will of the sovereign power,

has been expressly decided. While the State of Texas was a part of the territory of the republic of Mexico, that government granted certain lands in the State of Texas, and one of the conditions of the grant was, that the grantee should pay a certain sum to aid in the erection and maintenance of Roman catholic churches, and the support of the clergy of that church who administered therein the ceremonies of their religion: and this sum was a charge upon the lands, and a burden that every grantee, by the terms of his grant, bound himself and his grantees to pay and discharge. The object and policy of the Mexican government in imposing this condition was to insure the support and maintenance of the Roman catholic church which was in some measure the established religion of the State.

Subsequently the State of Texas became an independent republic, but neither the constitution nor any law of the republic declared the condition of these grants void. But the constitution of the republic did declare that no religion should be established by law, and that every man should be free to worship God according to the dictates of his own conscience.

The question of the continued validity of the conditions in these grants came before the supreme court of Texas, and that court held the condition "was discharged by force of change of the governments effected by the revolution of 1836, and the principle of religious liberty incorporated into the organic law of the republic, by which freedom of conscience was secured, and religion was emancipated from the authority." (*Wheeler v. Moody*, 9 Tex. 372, 376, and cases there cited.) In the case cited there was no express declaration of the sovereign power that the condition in these grants should be void; the beneficiary was still in existence, and the conditions could as well be complied with under the one government as the other, but the court held that to enforce its performance would be giving force and effect to a ^[246] principle opposed to the spirit and policy of the fundamental law on the subject of religion.

The fundamental ground on which emancipation proceeded was that the right of the slave to his freedom was paramount to the claim of his master to treat him as property; that slavery was founded in force and violence, and contrary to natural right; that no vested right of property or action could arise out

of a relation thus created, and which was an ever new and active violation of the law of nature, and the inalienable rights of man, every moment that it subsisted.

The last clause of section 4 of article xiv. declares that "neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

This clause was not inserted to discharge the United States and the several States from any legal obligation to pay for slaves emancipated, for no such obligation had been incurred. It is a limitation on the discretionary power of the legislative departments of both governments to appropriate money for such purpose, independently of any legal obligation, and to prevent the agitation and disturbance that would result from leaving the question in that situation. The very language of the constitution itself is conclusive on the question.

The language is not that such claims shall not be paid, but that such claims "shall be held illegal and void." No court is at liberty to hold that a claim is just and legal that the constitution of the United States brands as "illegal and void."

It is true this clause of the constitution does not in express words include the case of a claim by one citizen against another for the value of an emancipated slave; but the spirit of the constitution is to be respected no less than its letter.

And who can doubt that any claim for a slave, whether growing out of contract or otherwise, is within the spirit of this provision? If a claim against the United States for a ^[247] slave emancipated by that government is illegal and void, how can the claim of one citizen against another for that same slave be held legal and valid? The constitution takes from A slaves he purchased from B, and in answer to A's claim to be compensated for their value, says to him: "Your claim to these slaves was founded in force and violence, and their right to freedom was paramount to your right to treat them as property; your claim for compensation is, therefore, illegal and void."

Now, when B claims from A the price of these slaves, it is claimed that the same constitution says to him, "B's claim

against you for these same slaves is legal and valid, and you must pay it." Such an interpretation would do violence to the whole spirit of the constitution, and it would be giving the high sanction of the constitution of the United States to a code of justice not much less a violation of right, reason, and justice than the slave code itself.

The clause in question is based on the broad principle that there shall be no further recognition by the national government or the States of the idea that there could lawfully be property in man. And this principle cuts its way through all vested rights and obligation of contracts based on slave codes, and operates with full force on claims and demands of every character originating in the idea that human beings were property, and the lawful subject of traffic.

This construction is in harmony with the spirit of our institutions, and is the necessary and logical result of the grounds upon which slavery was abolished without compensation to the slave owners. Let judgment be entered for the defendants on the demurrer.

The principles here announced are also conclusive of the case of *Holmes and Wife v. Sevier, admr.*, pending on the chancery side of this court, in which the same judgment is rendered.

Judgment for defendants.

Note. Slave Contracts Contrary to Thirteenth and Fourteenth Amendments, and not enforceable though made before passage of amendments. — Followed, *Buckner v. Street*, *post*, 248, 252, 260.

Judgment Reversed on appeal, 18 Wall. 654 (Chase, C. J., dissenting), on the ground that defendant had used fraud in the procurement thereof in the lower court. As to all points of law, the supreme court fully concurred in the conclusion of the circuit court. This decision of the supreme court is affirmed. — *Boyce v. Tabb*, 18 Wall. 548.

[248] BUCKNER v. STREET, ASSIGNEE.

SLAVE CONTRACTS CONTRA BONES MORES — VALIDITY. — Contracts for the purchase and sale of slaves are against sound morals, natural right, and have no validity unless sanctioned by positive law.

REMEDY ON SLAVE CONTRACTS. — A remedy on such contracts may exist by virtue of the positive law under which they are made, but such remedy can only be enforced so long as that law remains in force.

SLAVE CONTRACTS — EFFECT OF THIRTEENTH AMENDMENT. — The thirteenth article of amendment to the constitution of the United States repealed all laws sanctioning slavery, and the traffic in slaves and the right of action on slave contracts does not survive such repeal, founded as it is on the supreme authority of the people of the United States.

ID. — STATUTORY CONSTRUCTION — RETROACTIVE LAWS. — The rule that statutes should not receive an interpretation that will give them a retrospective operation, so as to divest vested rights of property, and perfect rights of action, has no application, so far as relates to slaves and slave contracts, in the construction of the thirteenth article of amendment of the constitution of the United States.

Before CALDWELL, J.

CALDWELL, *District Judge.* — In *Osborn v. Nicholson*, *supra*, this court held that slave contracts derived all their obligation from the constitution and laws of the States in which they were made; that the only sanction or validity they had was by virtue of these laws; that the common law would not afford a remedy on such contracts, and that the abolishment of slavery by the thirteenth article of amendment of the constitution of the United States had the effect to repeal these laws, and that the repeal left the holders of such contracts without a remedy. The soundness of this position is questioned, and I propose briefly to review it.

It is conceded that a State cannot pass any law impairing the obligation of any contract, into which it has entered, nor can it pass any law impairing the obligation of any contracts between individuals.

There are qualifications to this general principle, which were pointed out in *Osborn v. Nicholson*. And a State can no more impair the obligation of its own or individual contracts, by the repeal of the statute under which they were made, than by an affirmative act declaring them void.

[249] But upon what ground were the judgments in the cases establishing these principles rested? Upon the sole ground that such legislation on the part of the State would be in conflict with that clause of the constitution prohibiting States from passing laws impairing the obligation of contracts. But for that constitutional provision, would or could the courts have rendered the judgments they did render in these cases?

The opinions of the judges in the numerous cases that affirm these principles afford a conclusive and satisfactory answer to this question.

Now, by what authority were the laws sanctioning slavery and the traffic in slaves repealed? By an amendment to the constitution of the United States, adopted by the people of the United States, and founded on their supreme authority. The moment it was adopted it became a fundamental law, of absolute, paramount obligation. If any State law or constitution, or any provision of the constitution of the United States, previously existing, conflicted directly or by fair implication with its provisions, it was repealed and abrogated. Has it ever been pretended that the limitation of the powers of the States were also limitations on the powers of the whole people of the United States, when acting in their aggregate, sovereign capacity in amending or altering their constitution of government?

The inhibition to pass laws impairing the obligation of contracts is limited to the States. They are, but the national government is not, prohibited from passing such laws. "No State can impair the obligations of a contract; but this inhibition does not apply to the general government." (*Bloomer v. Stolley*, 5 McLean, 165.)

"There is nothing in the constitution of the United States which forbids Congress to pass laws violating the obligation of contracts, although such a power is denied to the States individually." *Evans v. Eaton*, 1 Peters C. C. 327; and in *Hepburn v. Griswold*, 8 Wall. 637, in answer to the objection that the legal tender act impaired the obligation of contracts, [250] Mr. Justice Miller says: "Undoubtedly it is a law impairing the obligation of contracts made before its passage. But while the constitution forbids the States to pass such laws, it does not forbid Congress."

And the Congress of the United States passed laws annulling treaties, which are the most solemn form of contracts that the government can make; and the validity of such acts has always been maintained. (*Webster v. Reid*, Morris, 467; *Taylor v. Morton*, 2 Curt. 454; *Gray v. Clinton Bridge*, 1 Woolw. 150; *United States v. Tobacco Factory*, *post*; affirmed, 11 Wall. 616.)

Under our constitution of government the people are the source of all power—they are the supreme power—and their will, when embodied in the form of a constitutional provision, is declared by the constitution itself to be the "supreme law of

the land." It was this supreme law of the land that struck out of existence the laws sanctioning slavery, on which the slave dealer could alone rely to recover the fruits of his traffic.

Mr. Sedgwick says, the effects of the repeal of a statute, when it is clear and absolute, are of a very sweeping character. And after referring to the cases on the subject, he says: "It will be observed that the operation of the general rule is to give repealing statutes a very retroactive effect. . . . Efforts have been made to resist these results, and certain exceptions have been made to this retroactive application. The first is, that where a right, in the nature of a contract, has vested under the original statute, then the repeal does not disturb it. And in this country this principle is carried out and firmly established by the clause of the constitution of the United States, that no State can pass any law impairing the obligation of contracts."

Now, the soundness of this rule is not questioned, but its application to this case is denied. The repeal in this case was not by a State statute, nor yet by a law of Congress, but by the thirteenth amendment to the constitution of the United States, [251] which was the work of the sovereign people of the United States, on whose political and law-making powers there are no limitations, if we except those imposed by the Deity. They can divest vested rights, and annul and impair the obligation of contracts.

The impediment in the way of repealing acts passed by the States, having their legitimate and full operation on executory contracts, depending for their force and validity on the act repealed, does not obtain when the repeal is effected by an amendment to the constitution of the United States.

Mr. Sedgwick says that when a right, in the nature of a contract, has vested under the original statute, then the repeal does not disturb it; and he cites in support of this, *Fletcher v. Peck*, 6 Cranch, 87; *Gillmore v. Shooter*, 2 Mod. 310; *Couch v. Jeffries*, 4 Burr, 2460; *Churchill v. Crease*, 2 Moore & P. 415; *Terrington v. Hargreaves*, 3 Moore & P. 137.) "I have examined all these case. *Fletcher v. Peck*, as we all know, was ruled upon the ground that the act of the Georgia legislature was repugnant to the clause of the constitution inhibiting States from passing laws

impairing the obligation of contracts. All the English cases cited arose under positive enactments, and no question was made in any one of them as to the effect of a repealing statute, and they do no more than recognize the well-settled rule, that an act of Parliament cannot have a retrospective operation on past transactions, unless that intention is expressed, or appears by an unavoidable implication." In *Couch v. Jeffries*, Lord Mansfield, speaking of the intention of Parliament, says: "They clearly meant future actions." The next and last case cited for this position is *Butler v. Palmer*, 1 Hill, 324. The opinion of Judge Cowen in this case is a learned and unanswerable argument in favor of the rule I have laid down. A few passages taken from his elaborate opinion will show this very conclusively. He quotes approvingly the language of Lord Chief Justice Tindal, in *Key v. Goodwin*, 4 Moore & P. 341, 351, where that learned judge said: "I take the ^[252] effect of a repealing statute to be, to obliterate it (the statute repealed) as completely from the records of the parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and *concluded* whilst it was an existing law." And he says: "A number of cases have been cited by the counsel for the defendant, and some very strong ones, to show that any enactment of the *legislature* annulling contracts, or creating new exceptions and defenses, shall be so construed as not to affect contracts or rights of action existing at the time of the enactment." Here follow the cases cited by Mr. Sedgwick, and given above, and in addition, the case of *Dash v. Van Kleeck*, 7 Johns. 477. This last case will be noticed in another part of this opinion. He then says: "But these are all cases relating to positive enactments. None of them arose on a repealing clause; and they merely recognize the well-settled rule, as laid down by Best, Chief Justice, in the late case of *Terrington v. Hargreaves*, viz.: 'That the provisions of a statute cannot have a retrospective or *ex post facto* operation, unless declared to be so by expressed words, or positive enactment.' (*Vide*, 3 Moore & P. 143.) But, both in that case, and *Churchill v. Crease*, an express provision was allowed to have such an operation. I know the rights of action, and other executory rights arising

under a statute, are said to be vested. (*Couch v. Jeffries*, 4 Burr. 2462, and *vide*, *Beadleton v. Sprague*, 6 Johns. 101.) They are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract within the meaning of the constitution. But that being out of the way [and it is, when the repeal is effected as in this case by amendment to the constitution of the United States], and the statute being simply repealed, the very stock on which they were engrafted is cut down, and there is no rule of construction under which they can be saved. . . . A right carried into judgment, or taking the form of an express executory contract under a [253] repealed statute, might, perhaps, also stand on the same ground with the devise in *Jenkins*; and so of other rights having means of vitality independent of the statute. But, where everything depends on this, it seems to be equally a violation of principle as of authority to say, that any one of its provisions can be enforced or executed after it has been repealed by a general clause."

Slave contracts "have no means of vitality independent of the statute." Every one who asserts a right grounded on slavery, or rights under contracts growing out of that institution, must show an existing positive rule of law that authorizes him to assert and claim such rights. It cannot be asserted, under the common law derived from England, and incorporated into the jurisprudence of this country; for, by that law, slavery and slave contracts are held to be against sound morals and natural justice and right, and utterly illegal and void. (*Vide*, Lord Mansfield in *Somerset's Case*; *Forbes v. Cochrane*, 2 Barn. & C. 448; Story's Conflict of Laws, §§ 96, 242, 244, 259; *Greenwood v. Curtis*, 6 Mass. 361, opinion of Judge Sedgwick; *Kauffman v. Oliver*, 10 Barr. 514; 2 Kent Com. 283, *et seq.*; opinion of Justices McLean and Curtis, in the *Dred Scott Case*, *supra*; *Jones v. Vanzandt*, 2 McLean, 596, 603; *Marshall v. B. & O. R. R. Co.* 16 How. 314, 334; *Bank of the United States v. Owens*, 2 Peters, 527.) "Although the English law has recognized slavery, it has done so within certain limits only; and I deny that in any case an action has been held to be maintainable in the municipal courts of this country, founded upon a right arising out of slavery." (Per Chief Justice Best,

in *Forbes v. Cochrane*. And see opinion of this court in *Osborn v. Nicholson*.)

The common law recognizes no vested right of action in, and will not uphold, contracts which are against good morals, religion, and natural right, and opposed to the fundamental policy of the government. And such rights cannot now be asserted under the laws that gave sanction to slavery and slave contracts, for these laws, in the language of the court, ^[254] in *Butler v. Palmer*, "being simply repealed, the very stock on which they were engrafted is cut down, and there is no rule of construction under which they can be saved." (*Butler v. Palmer, supra*; *Key v. Goodwin, supra*; *Norris v. Crocker*, 13 How. 429; *Kimbro v. Colgate*, 5 Blatchf. 229, 231; *Moffit v. Garr et al.* 1 Black, 273; *Surtees v. Ellison*, 9 Barn. & C. 752.)

The fugitive slave law of 1793, as well as that of 1850, gave to slave owners a right of action against any person who should carry off, harbor, or conceal their slaves, and fixed the measure of damages in such cases. And these acts afforded to slave owners the only remedy they had in such cases outside of the slave States. (*Jones v. Vanzandt*, 2 McLean, 596; *Kauffman v. Oliver*, 10 Barr. 514; *Prigg v. Penn.* 16 Peters, 539; and see Fugitive Slave Acts of 1793 and 1850.)

Yet, when a right of action accrued for carrying off, harboring, and concealing slaves, under the Act of 1793, and suit was brought for damages fixed by that act, and was pending when that act was repealed by the Act of 1850, it was held that the action fell with the repeal of the statute (*Norris v. Crocker*, 13 How. 429), thus leaving slave owners, whose slaves had been wrongfully taken from them, remediless.

Now, certainly one whose property is wrongfully taken from him, and lost or destroyed by another, is upon every principle of justice and right as much entitled to compensation for the value of the property, so wrongfully taken, and to a remedy to recover that value, as he is to a remedy to recover the agreed value of property from one to whom he may have sold it. And on principle and reason, is there not just as much ground to declaim against a rule of construction that takes away the right of action in the one case as the other?

States may pass retrospective or retroactive laws that will

divest antecedent vested rights of property, if they do not technically impair the obligation of contracts. (*Calder v. Bull*, 3 Dall. 388; *Watson et al. v. Mercer*, 8 Peters, 110; *Baltimore & S. R. v. Nesbit*, 10 How. 395; *Satterlee v. Mathewson*, 2 Peters, 380.)

[255] Such laws would seem as obnoxious on principle as laws that impair the obligation of contracts. But in the one case they are held valid, because there is no limitation on the power of the States to pass retroactive laws, and in the other void, because there is a limitation on the States that prevents them from passing laws impairing the obligation of contracts.

The fifth amendment to the constitution of the United States declares that no person shall be "deprived of life, liberty, or property without due process of law." And the supreme court of the United States has said that by the constitution of the United States, and of all the States of the Union, as well as by the universal law of all free governments, private property can be taken for public use only upon making to the owner just compensation. And yet we know that the right of property in all the slaves within the jurisdiction of the United States was destroyed by this amendment, without compensation.

Is the right of the people of the United States to do this thing questioned? It could be questioned only on the grounds advanced by Lord Coke, in *Bonham's case*, that the common law controlled acts of parliament, and adjudged them void when against common right and reason. But all the judges since his time have said it was for parliament and the king to judge what common right and reason was; and Lord Campbell styles what was said by Lord Coke in this case, "nonsense still quoted by silly people." (Campbell's *Lives of the Lord Chancellor*, vol. 2, 372, 373, and note; Campbell's *Lives of the Chief Justices*, vol. 1, 290.)

A stronger epithet than that applied by the Lord Chancellor to those who quote Lord Coke's *dictum* in *Bonham's case* as authority, might justly be applied to those who question the power and authority of the people of the United States, by amendment of their constitution of government, to abolish slavery and obliterate all rights depending for their validity and enforcement on slave codes. They have done it, and how is their action

to be justified to the slave owner and all ^[256] others affected by it, and to the world? Upon the ground that slavery was founded in force and violence, and contrary to natural right; that the right of the slave to his freedom was paramount to the claim of his master to treat him as property; that no vested right of property or action could arise out of a relation thus created, and which was an ever new and active violation of the law of nature, and the inalienable rights of man, every moment that it subsisted. It was not, as was held in *Jacoway v. Denton*, 25 Ark. 625, a revolutionary measure. It was the work of the sovereign people of the United States, for the purpose of conforming their constitution and laws to the immutable principles of eternal justice. And to liken the right of property in a human being to the right of property in a chattel, and a right of action for the price of a human being to the right of action for the price of a chattel, is to confound all distinction between right and wrong. Was the right of property in slaves less sacred, and any more beyond the reach of that amendment, than a right of action based on a slave contract? If A purchased from B a slave, and gave his note for the agreed price, was not A's right of property in the slave upon every principle of law and ethics as sacred and as much entitled to protection as B's right of action on the note given for the slave? Did not the right of property in the one case, and the right of action in the other, grow out of the same transaction? And did they not in both cases depend for their validity and enforcement on the same laws? And when those laws were abolished, did they not both fall together? Is the amendment effectual to destroy the substance, but not the shadow? To destroy or preserve the one is to destroy or preserve the other.

In *Osborn v. U. S. Bank*, 9 Wheat. 866, Chief Justice Marshall says: "It is not unusual for a legislative act to involve consequences which are not expressed"; and this is true of a repealing statute in a greater degree than in any other form of statute, but it applies with greater force to a ^[257] constitutional provision operating as a repealing statute than to a law in any other form.

A constitution is a fundamental and paramount law, and its operation and effect cannot be limited or controlled by previous

laws or constitutions in conflict with it, nor by any previous policy of the government. The thirteenth and fourteenth amendments are a denunciation of slavery in all its forms. The relation of master and slave is destroyed; the former slave is made a citizen of the republic; the buying and selling of men is denounced; the slave is taken from one who purchased him and held him under a contract, warranting that he was a slave for life, and this is done without making compensation to the owner, and without giving him a right of action on his warranty; and the slave dealer is left without a slave code, under and by virtue of which alone contracts growing out of that traffic can be enforced. All these consequences are necessarily implied in these amendments, and "what is implied in a statute is as much a part of it as what is expressed." (*United States v. Babbitt*, 1 Black, 61; *Gelpcke v. City of Dubuque*, 1 Wall. 221.)

And 'his retrospective operation of the amendments, and the results that flow legitimately from them, are not to be avoided by considerations of inconvenience and hardship. It might be argued that the thirteenth amendment did not divest the right of property in slaves in being held and possessed as property at the time of its adoption.

If a provision in the same words was found in a State statute, it might very plausibly be contended that it must be presumed the legislature did not intend to divest and destroy existing rights of property without compensation, and that it must therefore be restricted to slaves coming into being after the passage of the act, and we know that authorities would not be wanting to support such a construction. Why attempt to apply the rules for the construction of statutes divesting vested rights, and impairing the obligation of contracts, to one consequence of the amendment more than to another?

[258] "In construing the language of a constitution, we have nothing to do with the argument *ab inconvenienti* for the purpose of contracting or enlarging its import, the only sound principle being to declare *ita lex scripta est*, to follow and to obey." (*People v. Morrell*, 21 Wend. 563.) And in the *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9, Judge Denio, speaking of the court of appeals, says: "But we are not to interpret the constitution precisely as we would an act of the legislature.

The convention was not obliged, like legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to the ratification of the people, and the constitution of the federal government, with all private and social rights, and with all the existing laws and institutions of the State. If the convention had so willed, and the people had concurred, all former charters and grants might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way. The rule laid down in *Dash v. Van Kleeck*, 7 Johns. 477, and other cases of that class, by which courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, have but a limited application, if any, to the construction of a constitution." And the court in this case held the provision of the constitution of 1846, of the State of New York, subjecting the stockholders of banks to personal liability, to be retrospective in its operation, and subjected stockholders of banks to liability who were exempted from personal liability by their articles of association, adopted and in force when this constitutional provision went into effect. The whole opinion in this case is learned and [259] instructive, and fully supports the ruling here made. The court was undoubtedly right in holding that the rule with reference to giving a statute a retrospective operation on past transactions has but a limited application, if any, to the construction of a State constitution; and it has none at all in the construction of the thirteenth article of amendment of the constitution of the United States; upon the operation of which, retrospectively as well as prospectively, there is not, and cannot be in the nature of things, any limitation.

And this principle of giving a retrospective effect to a constitutional amendment was recognized by the supreme court at a very early day.

In *Chisholm, Executor, v. Georgia*, 2 Dall. 419, the supreme court decided that a State could be sued by an individual citizen of another State. This decision induced the adoption of the eleventh amendment to the constitution, declaring that the judicial power of the United States should not extend to such cases. When this amendment was adopted, suits were pending in the supreme court against States, brought by citizens of other States. It was contended that the jurisdiction of the court was unimpaired in relation to all suits instituted previous to the adoption of the amendment. But the court was unanimous in holding, that after the adoption of the amendment, it could not exercise jurisdiction in any case, past, present, or future. (*Hollingsworth et al v. Virginia*, 3 Dall. 378.) In the opinion in support of this jurisdiction, *Chisholm v. Georgia, supra*, Justice Cushing uses this language: "The right of individuals, and the justice due them, are as dear and precious as those of the States. Indeed, the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is government." The precious right here spoken of was the right to coerce a State by suit to comply with the obligation of her contract; but as precious as this act was, the court held the eleventh amendment divested them of jurisdiction in all cases, past and future, thus giving ^[200] a retrospective effect to the amendment, and leaving the creditors of States remediless. The thirteenth amendment works the same result on all slave contracts. This amendment is remedial in its nature, and, according to settled canons of construction, must be so construed as to suppress the whole mischief.

The rule that when a perfect right of action has accrued on a contract authorized by statute, a repeal of the statute does not affect it (*Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450), must rest for its support on one of these two grounds: (1) that to give the repealing statute that effect would impair the obligation of a contract, and make it obnoxious to the constitutional provisions prohibiting States from passing such laws; or (2) that the right of action on the contract being perfect before the repeal, the common law will afford a remedy independent of the statute. As to the first ground, we have seen that it does not

apply when the repeal is effected by the sovereign power of the nation. And the second has no application when the contract, though valid by the law when made, is in its nature inherently vicious and contrary to sound morals and natural justice and right, and to the fundamental policy of the government. All remedies are given by virtue of some law. Under what law can the slave dealer assert his right of action? Not under the laws that sanctioned the right, for they are abolished. He must then seek it under the common law. But the common law brands all such contracts as vicious, immoral, contrary to the law of nature, and void.

And the moment the positive authority of the laws, under which such contracts were made, was removed by their repeal, the common law seized upon them and stamped them as illegal and void. (*Osborne v. Nicholson, supra.*)

It was not so in *Pacific Mail Steamship Co. v. Joliffe, supra.* There the contract was one that the parties might have made independently of the statute, and one that the common law would have enforced, and that it did enforce, independent of the [261] statute. But a positive law giving and enforcing the right of action on a slave contract is as necessary to its validity as air is to human life, and such right can no more survive the repeal of such positive law by the thirteenth amendment, than a human being can live without air.

C. H. Carlton, for the Plaintiff.

W. B. Street, for the Defendant.

GILCHRIST v. LITTLE ROCK.

MUNICIPAL BONDS ISSUED FOR RAILROAD STOCK—VALIDITY.—A *bona fide* holder of the negotiable bonds of a municipal corporation having express and unrestricted authority to issue them, may recover thereon, although made payable at an earlier date than directed in the ordinance of the city relating to the mode of executing them.

Id.—The federal court in an action by the *bona fide* holder of negotiable bonds issued by a municipality of the State under express legislative authority, declined, under the circumstances and for the reasons stated, to overthrow, at the instance of the defendant, the legislative act, on the ground that it was in conflict with the State constitution.

Before DILLON, J., and CALDWELL, J.

ACTION on negotiable bonds and coupons issued by the city of Little Rock in payment for stock subscribed by the city in a railroad company. An act of the legislature of the State authorized the subscription and the issue of bonds, and *did not* prescribe the time for which they should run. The bonds are dated June 1, 1859, and contain a recital that they are issued and executed in pursuance of law, and an ordinance of the city passed on the 20th day of March, 1855. The bonds are payable on or before July 1, 1870. The ordinance of March 20, 1855, directed the bonds to be made payable *fifteen years after the date thereof*," and seemed to contemplate ^[see] an immediate issue. But the act of the legislature authorizing their issue was not passed until 1859, whereupon the city (May 19, 1859), passed an ordinance "to revive and put in force" the ordinance of March 20, 1855, and ordering the "mayor of the city to cause to be filled up and executed one hundred bonds of this city for one thousand dollars each as provided in the ordinance of March 20, 1855," etc. The bonds were accordingly issued and sold, but were made payable on or before July 1, 1870, as before stated. The cause was submitted on a demurrer to pleas raising the questions below decided.

Watkins & Rose, for the Plaintiff.

Mr. Warwick, for the Defendant.

DILLON, *Circuit Judge*, delivering orally the opinion of the court. — In substance it was *held*, (1) That the bonds were not *void* in the hands of the plaintiff, on the ground that they were made payable at a shorter date than fifteen years. This objection does not go to the question of *power*, but is at most an irregularity or a failure to comply with directory provisions of the ordinance. Since the act of the legislature did not prescribe the *time* for which the bonds were to run, but left that to the corporation, bonds issued by the corporation payable at a date earlier than that named in the ordinance were binding upon it, certainly so when such bonds had been sold and were in the hands of innocent holders for value.

Held, (2) That in the absence of any decision of the supreme court of the State upon the question of the constitutionality of the legislation authorizing municipal indebtedness and taxation to pay for stock in railway companies, and considering the state of the adjudications upon that subject in the different States, and particularly the course of decision in the supreme court of the United States upon the liability of corporations issuing such bonds, the court, whatever might be ^[263] their individual opinion on the general question, or as to how it should be decided in the State tribunals, would not (under these circumstances) hold the bonds to be unconstitutional. The court observed that the present weight of the authority was, perhaps, in favor of the power of the legislature, and it was not befitting that the national courts should, on a subject respecting which so much doubt exists in the professional and judicial mind, declare to be unconstitutional legislation, and to overthrow a legislative policy which had never been questioned in the tribunals of the State, especially when the question was presented to it in action by a *bona fide* holder of the bonds.

Judgment for plaintiff.

[NOTE. — In *Ranlett v. Leavenworth*, the circuit court of the United States for the district of Kansas, at the May term, 1871 (present MILLER, J., and DILLON, J.), prior to the decision of the supreme court of Kansas affirming the constitutionality of such bonds, declined for reasons substantially the same as those stated above, to pronounce the bonds held by the plaintiff (a *bona fide* holder) to be void for the want of authority in the State legislature, under the State constitution, to authorize their issue. As to the other point, it may be observed that the courts, while differing on the constitutional question, concur with great unanimity in holding that there is no *implied* authority in municipal corporations to take stock in railway or manufacturing enterprises, and to levy taxes, or borrow money to pay bonds or debts thus incurred; power of this kind must be *expressly conferred*. (*Aurora v. West*, 22 Ind. 88; *Starin v. Genoa*, 23 N. Y. 439, 456; *Atchison v. Butcher*, 8 Kan. 104; *Bridgeport v. R. R. Co.* 15 Conn. 475; *Marsh v. Fulton Co.* 10 Wall. 676; *Nichols v. Nashville*, 9 Humph. 252; *City v. St. Louis*, 23 Mo. 483; *Jones v. Mayor*, 25 Geo. 610.) As to *manufacturing and private enterprises*. (*Cook v. Manuf. Co.* 1 Sneed, 698; *Clark v. Des Moines*, 19 Iowa, 190.)

A municipal corporation may successfully defend against a bond, though negotiable in form, and in the hands of innocent purchasers, on the ground that its officers or agents had no *power* by law to issue it. This sound, safe, and true rule of law has had the uniform approval of the State courts (*Aurora v. West*, 22 Ind. 88, 508; *City v. Alexander*, 23 Mo. 583; *Starin v. Genoa*, 23 N. Y. 439; *Mercer Co. v. Pittsburgh*, 27 Pa. St. 389; *Mercer Co. v. Hackett*, 1 Wall. 83; *Marshall Co. v. Cook*, 38 Ill. 44; *Treadwell v. Commrs.* 11 Ohio St. 183); and has recently received the express sanction of the supreme court of the United States. (*Marsh v. Fulton Co.* 10 Wall. 676.)

[264] But no favor is given where bonds, negotiable in form, are in the hands of *bona fide* holders, to mere irregularities in their issue not going to the question of the power to issue or contract. (*Knox Co. v. Aspinwall*, 21 How. 539; *Gelpcke v. Dubuque*, 1 Wall. 175; *Moreau v. Commrs.* 2 Black, 722; *Bissell v. Jeffersonville*, 24 How. 287; *Butz v. Muscatine*, 8 Wall. 575; *Mercer Co. v. Hackett*, 1 Wall. 83; *Commrs. v. Nichols*, 14 Ohio St. 260; *Myer v. Muscatine*, 1 Wall. 384, 393; *Van Hastrup v. Madison*, 1 Wall. 291; *Butler v. Dunham*, 27 Ill. 474.) Remedy of holder. *Riggs v. Johnson Co.* 6 Wall. 166; *Welch v. Ste. Genevieve*, ante, 130; *Railroad Co. v. Otoe Co.* post.]

UNITED STATES v. TOBACCO FACTORY, BOUDINOT, CLAIMANT.

INDIAN COUNTRY—POWER OF CONGRESS OVER.—The Indian country is within the jurisdiction of the United States, and congress may exercise municipal legislation over it.

ID.—INTERNAL REVENUE LAWS.—The internal revenue tax, provided by section 107 of the Act of July 20, 1868, is valid, and collectible in the Indian country.

TREATY—ABROGATION BY CONGRESS.—Congress may abrogate a treaty so far as it is municipal law, provided the subject-matter is in the legislative power of Congress.

THIS was an information filed in the district court of the United States for the western district of Arkansas against a tobacco manufactory established and carried on in the Cherokee nation, in the Indian territory. The claimant, E. C. Boudinot, alleges that he is a Cherokee Indian, and claims that he has a right to establish and carry on the business of manufacturing and selling tobacco in the Indian country, without complying in any respect with the provisions of the internal revenue laws on that subject.

This claim is urged upon three grounds: First, that it is not competent for Congress to extend any portion of the internal revenue laws over the Indian country. Second, that section 107, of the Act of July 20, 1868, nor any other provision of that act, was intended to extend such laws over that country. Third, that if that was the intention of the Act of July 20, 1868, it cannot have that effect, because it would be inconsistent with article x. of the treaty of July 19, 1866, between the Cherokee nation and the United States, which is in the following words:—

“Every Cherokee and free person resident in the Cherokee [205] nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without any restraint, or paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory.”

CALDWELL, *District Judge*, in deciding the case held:—First. That the Indian country is within the jurisdiction of the United States, and that Congress may extend all laws, within the constitutional limits of municipal legislation over the same. (Citing *Cherokee Nation v. Georgia*, 5 Peters, 1; *Worcester v. Georgia*, 6 Peters, 515, 519; *Mackey v. Cox*, 18 How. 100; *United States v. Rogers*, 4 How. 567, and *The Kansas Indians*, 5 Wall. 737.) The judge added:—

“Ever since the organization of this court it has sat here administering and enforcing the laws of the United States over the Indian country. Indians are taken from that country, brought here for trial, and are tried and punished—in some instances capitally. They are prohibited from trafficking in certain articles. Until recently they could not sell their cattle without permission of the United States agent. (13 U. S. Stats. 563, §§ 8, 9.) They cannot alienate their lands, neither can they permit citizens of the United States to settle within their country without the consent of the United States. By permission of the United States they have jurisdiction of offenses committed by one Indian on the person or property of another Indian. But this power is granted them from considerations of policy, and no one doubts that Congress might invest this court with that jurisdiction. They are without a single attribute that marks a sovereign and independent nation or people.”

Second. That the internal revenue laws imposing taxes on manufactured tobacco are in force in the Indian country. Section 107 of the internal revenue act of July 20, 1868, which was thus construed, declares “that the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, [206] and cigars, shall be held and construed to extend to

such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not." It was admitted that the Cherokee nation is "within the exterior boundaries of the United States." "Not only," said the judge, "is the Indian territory embraced within the letter of said section 107, but it is also within the reason and policy of the internal revenue laws relative to the manufacture of tobacco."

Third. That although a treaty is the law of the land, under the constitution of the United States, Congress may abrogate it, so far as it is municipal law, provided its subject-matter is within the legislative power of Congress. (Citing *Taylor v. Morton*, 2 Curt. 454; *Dred Scott v. Sandford*, 19 How. 629, 630, per Curtis, J.; *Gray v. Clinton Bridge*, 1 Woolw. 150; *Webster v. Reid*, Morris, 467.)

Fourth. That so much of article x. of the treaty of July 19, 1866, between the United States and the Cherokee nation, as is repugnant to the provisions of the Act of Congress of July 20, 1868, imposing taxes on manufactured tobacco, is thereby abrogated.

The decree of the learned judge was affirmed in the supreme court of the United States, on substantially the foregoing views. (*The Cherokee Tobacco*, 11 Wall. 616.)

J. H. Huckelberry, District Attorney.

W. G. Whipple, and *E. D. Ham*, for the United States.

Jesse Turner, and *Granville Wilcox*, for the Claimant.

Briefs were also filed by *Albert Pike* and *A. H. Garland*, for the Claimant.

Note. Abrogation of Treaty, Respecting Municipal Law, within power of Congress. — Followed, *Buckner v. Street*, ante, 250.

Judgment Affirmed on appeal, 11 Wall. 616.

[267] SCHENK v. PEAY AND BLISS, ORIGINAL BILL;
PEAY v. SCHENK AND BLISS, CROSS BILL.

BOARD OF TAX COMMISSIONERS — ACT OF JULY 20, 1868. — The Act of July 20, 1868, declaring that acts performed by any two of the tax commissioners shall have the same effect as if performed by all three, though retrospective, is not therefore repugnant to the constitution. Such act does not give validity to the acts of two commissioners unless three were in office.

OFFICERS DE JURE AND DE FACTO — WHO ARE. — A person appointed to an office without authority, and who never performed an official duty as such officer, is not an officer *de jure* or *de facto*.

OFFICE — APPOINTMENT — POWER OF PRESIDENT. — Where an office is created and takes effect during a session of the Senate, and a subsequent session of Congress passes without the same being filled, the President cannot make a valid appointment to such office during a recess of the Senate.

STATUTES — REPEAL BY IMPLICATION. — A subsequent statute, inconsistent with or repugnant to a former statute, repeals it by implication.

EQUITY — TAX SALE — FRAUD TO SET ASIDE. — A court of equity will set aside a tax sale where there was fraud and collusion between the officer making the sale and the purchaser.

TAXES — VALIDITY OF ASSESSMENT — ACT OF JUNE 7, 1862. — Under the Act of Congress of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, the penalty of fifty per cent could not be assessed on lands at the date of the apportionment of the direct tax. An assessment of the penalty simultaneously with the apportionment was unauthorized and rendered void a sale for taxes under such assessment and appointment.

FORFEITURE FOR NON-PAYMENT OF TAXES. — Congress may declare a forfeiture for non-payment of taxes that will take effect *ipso jure*. But the courts will not give it such construction unless the intention that such should be the effect clearly appears.

TAX SALE — REDEMPTION — ACT OF JULY 7, 1862. — A lien creditor of the owner of the fee is an "owner of the land" in the meaning of the Act of 1862, and for the purpose of paying taxes on the land on which he has a judgment or attachment lien, or for the purpose of redeeming the same from tax sale.

TAXES — TENDER EQUIVALENT TO PAYMENT. — A lawful tender of the tax on lands to the officer authorized to receive it is tantamount to an actual payment, and divests the authority of the officer to sell the land for taxes.

THE general nature of these cases is stated, and MR. JUSTICE MILLER's opinion on the demurrer to the cross bill appears, in 1 Woolw. 175, to which the reader is referred for greater detail. Subsequently, at the April term, 1869, the cause came on for final hearing before CALDWELL, district judge (alone holding the circuit court), and a decree was entered for the complainant in the cross bill, in conformity with an elaborate and able opinion pronounced by the learned district judge, covering fifty printed pages. Its length precludes its insertion in the present volume. From this decree Bliss appealed to the supreme court of the

United States, but after the judgment of that tribunal in *Bennett v. Hunter*, 9 Wall. 326, the appeal was abandoned.

In the course of his opinion, CALDWELL, J., ruled the following points in relation to the acts of Congress authorizing the boards of commissioners in the States in insurrection against the federal government, to assess upon real estate therein due proportions of the direct tax imposed by Congress under the Act of August 5, 1861, and the proceedings of the commissioners thereunder.

CALDWELL, *District Judge*, held, in substance, as follows:—

1. The Act of Congress of July 20, 1868 (15 U. S. Stats. 123), which declares “that the acts and proceedings which have been had or performed by any two of the tax commissioners in and for the State of Arkansas, shall have the same force and effect as if had and performed by all three of said commissioners,” is retrospective in its terms, but is not, therefore, repugnant to the constitution. (*United States v. The Peggy*, 1 Cranch, 103; *Sampeyreac v. United States*, 7 Peters, 222; *The Prize Cases*, 2 Black, 670, 671.)

[268] 2. That act does not give validity to the acts of two commissioners, unless there were three commissioners in office.

3. One who was appointed to an office without authority, and who never performed any official duty as such officer, and never had the reputation of being such officer, is not an officer *de jure* or *de facto*.

4. Where an office was created and took effect during a session of the Senate, and a subsequent session of Congress passed without the office being filled; *held*, that the President could not make a valid appointment to such office in the recess of the Senate.

5. A court of equity will set aside a tax sale where there was fraud and collusion between the officer making the sale and the purchaser.

6. A subsequent statute, inconsistent with or repugnant to a former statute, repeals it by implication; and *held*, that the last proviso to section 7 of Act of June 7, 1862 (13 U. S. Stats. 422), was repealed by implication, by section 6 of the joint resolution, passed February 25, 1867. (14 U. S. Stats. 568.)

7. Under the Act of Congress of June 7, 1862, the penalty of fifty per cent could not be assessed on lands at the date of the apportionment of the direct tax; and *held*, that an assessment of the penalty simultaneously with the apportionment of the tax was unauthorized, and rendered void a sale for taxes under such assessment and apportionment.

8. Congress may denounce a forfeiture for the non-payment of taxes that will take effect *ipso jure*, but such forfeitures are not favored in law, and the courts will not give a statute such a construction unless the intention that it should have such effect is made clearly to appear; and *held*, that the forfeiture provided for in section 4 of the Act of 1862 did not vest the title of the United States until after the sale of the land.

9. A lien creditor of the owner of the fee is an "owner of the land" within the meaning of those words as used in the [269] Act of 1862, and for the purpose of paying taxes on the lands on which he has a judgment or attachment lien.

10. A lawful tender of the tax on lands to the officer authorized to receive it, is tantamount to an actual payment of the tax, and *ipso facto* divests the authority of the officer to sell such land for taxes.

11. Under the Act of Congress of 1862, one having an attachment lien on lands sold for taxes may redeem them from such sale.

12. A tender of the proper amount by one having a right to redeem, to the proper officer, and within the time allowed by the act for redemption, will operate to defeat the title of the purchaser at the tax sale.

13. Under the Acts of 1863, and the acts amendatory thereof, one commissioner could not conduct and make a sale of delinquent lands, in the absence of both his co-commissioners.

Rice & Benjamin, and T. D. W. Yonley, for Schenk and Bliss.

Watkins & Rose, Gallagher & Newton, and Stillwell, Wassell & Moore, for Peay.

Effect of Appeal and Supersedeas Bond.—By order of the court at the April term, 1868 (1 Woolw. 175, 191), the property in controversy in this case was put into the hands of a receiver,

with the usual directions. On the rendition of the decree at this term, which, among other things, required the receiver to turn over the possession of the property and the rents to Peay, the complainant in the cross bill, the defendants, Schenk and Bliss, prayed an appeal, which was allowed; and thereupon a supersedeas bond was filed and approved, in a penalty fixed by the court (\$6,000) sufficient to cover costs and the rents of the property received by Bliss prior to the appointment of a receiver, and for which, by the terms of the decree, he was required to account.

On a subsequent day, the defendants Schenk and Bliss, by their solicitors, moved for an order directing the receiver to [270] turn over to them the possession of the property and the rents in his hands, on the ground that a party who appeals and files a supersedeas bond is thereby entitled to have delivered to him any money or property in the hands of a receiver, or in the custody or control of the court; if (as was the case here) that custody or possession had been taken from him in the progress of the litigation by an order appointing a receiver, or otherwise.

CALDWELL, *District Judge*. — The motion is overruled. The supersedeas was only intended to cover the actual present liability of the defendants under the decree. Even if the bond was in a penalty equal to the value of all the rents, past, present, and prospective, it could not have any other effect than to stay the active operation of the decree, and would not entitle the defendants to the active interposition of the court in their behalf, and the revocation of orders existing at the date of the decree, and to the custody of property and money in the hands of the receiver in pursuance of such orders. (See *Smith v. Allen*, 2 Smith, E. D. 259; *Stafford v. Kirkland*, 16 How. 135.)

Motion overruled.

Note. *Right of Redemption from Tax Sale Valid*, and favored policy of the law. — Cited, *Barrett v. Holmes*, 102 U. S. 657; S. C. 2 Morr. Trans. 55.

DISTRICT OF NEBRASKA.

[271] THE UNITED STATES v. YELLOW SUN, ALIAS
SA-COO-DA-COT.

INDIANS WITHIN STATE LIMITS—JURISDICTION OF FEDERAL COURTS.—Indians, though belonging to a tribe which maintains the tribal organization, but occupying a reservation *within* the limits of a State, where there are no statute or treaty provisions, granting or retaining jurisdiction in favor of the United States, over offenses committed by them, are amenable to State laws for murder or other offenses against such laws, when committed *off* the reservation, and within the limits of the State.

JURISDICTION OVER OFFENSES UPON RESERVATION.—As to jurisdiction of United States courts, over offenses, under such circumstances, committed by Indians upon reservations, *quere?*

JURISDICTION—ARREST OF JUDGMENT BY COURT ON ITS OWN MOTION.—The court, in a capital case against Indians, though neither party asked it, and both demanded judgment, on a verdict of guilty, arrested the judgment *on its own motion*, for want of jurisdiction in the court over the offense charged.

ID.—Under these circumstances the court, after arresting the judgment, instead of at once discharging the defendants, made a special order for turning them over to the State authorities.

INDIANS—RELATION TO FEDERAL AND STATE GOVERNMENTS.—The relations which Indians residing within State limits sustain to the general government, and that of the State, discussed by the circuit judge.

[272] Before DILLON, J., and DUNDY, J.

THE defendants, four in number, and Indians, have been *indicted in this court*, charged with and convicted of the murder of one Edward McMurty, a white inhabitant of the State of Nebraska. They were tried before MR. DISTRICT JUDGE DUNDY, sitting alone in this court, upon their plea of "not guilty." Prior to the verdict, neither by demurrer, motion, plea, or otherwise, did the defendants make any objection to the jurisdiction of the court. After a verdict of guilty they made a motion for a new trial, and another in arrest of judgment. By the latter motion the question as to the jurisdiction of the court was for the *first time* presented. These motions were argued and submitted at the last regular term of the court, but before any decision thereof was made, the defendants asked and the court granted leave to withdraw them. This was at the adjourned February term, 1870. Whereupon the district attorney, in

behalf of the United States, moved for judgment upon the verdict.

This motion is not resisted by the defendants, or the counsel who represents them.

Mr. Strickland, District Attorney, with whom, *Mr. Baldwin*, for the United States.

Mr. Chase, for the Defendants.

DILLON, *Circuit Judge*.—The present attitude of this case is not a little singular. The one party asks, and the other, acting under the advice of skillful counsel, does not resist a judgment, which is the highest human laws can authorize, or a human tribunal pronounce. It is the court alone which hesitates. In explanation of the course which the counsel for the defendants has taken in withdrawing all question as to the jurisdiction of the court, a reason has been given, [273] which, for the honor of the people of the State it is hoped can have no real foundation, viz.: that such is the strength of the tide of local prejudice against them and their nation, that they prefer to take a sentence of death and trust to executive interposition, than to run the risk of illegal violence if discharged from this court or turned over to the authorities of the State. The court avails itself of this occasion to express its conviction that fears of this character are groundless.

As the defendants have been duly indicted and convicted, it is the duty of the court to pass judgment against them, if it has *jurisdiction* of the crime charged in the indictment. Whether it has such jurisdiction is the only question remaining to be decided. Notwithstanding the withdrawal of the motion in arrest, it is still the duty of the court, before pronouncing sentence of death, to be satisfied that it has cognizance of the offense which it is proceeding to punish. No act which a court can be called on to perform is more grave and solemn than to render a capital judgment. To the performance of such a duty, a judge is reconciled only by the consideration that it is not he who does it, but *the law* of which he is simply the minister. But if the law invests him in the particular case with no such power, he may well deliberate and must refuse to exercise it.

If the court has no jurisdiction, therefore, it is its duty, on its own motion, to stay judgment, although the question may not be made, or may be waived, by counsel.

With these preliminary considerations, which seemed proper to be stated, we proceed to examine the question whether the courts of the United States have jurisdiction of the offense for which the defendants have been convicted.

The only allegations in the indictment made with a view to show the jurisdiction of the court are the following: "That the defendants are Indians belonging to the Pawnee tribe, which tribe were and are in charge of a United States Indian agent duly appointed by the United States, and were and are living upon an Indian reservation known as ^[274] the 'Pawnee Reservation,' within the State of Nebraska; and that said defendants crossed the boundary line of said Indian reservation, and entered into the county of Polk, in the State of Nebraska aforesaid, and then and there unlawfully," etc., did kill and murder, by shooting, as particularly described in the indictment, one Edward McMurty, a white inhabitant of said State. Thus, it appears by the express averments of the indictment, that the place where the offense was committed was within the body of the county of Polk, in the State of Nebraska, and not within the limits of the Indian reservation. The proof corresponded with the allegations. The offense is alleged and was shown to have been committed on the 8th day of May, 1869, which was after Nebraska had been admitted into the Union, and her organization as a State fully perfected and in operation. The question is, whether the offense thus committed is one of which the courts of the United States have cognizance, or whether it is alone cognizable, if at all, by the courts of the State of Nebraska.

Within the territorial limits of the State just named is a body of people known as the Pawnee tribe of Indians, to which the defendants belong. This region has long been their home; but their occupancy is now restricted to a "reservation," of limited extent. Here they reside in a body, maintaining their tribal organization, under the superintendence of agents appointed by the government of the United States. They are already in the midst of a white population, but do not enjoy any of the polit-

ical, nor many of the civil, rights of the latter. They do not vote, are not taxed, and under the decisions of the supreme court of the United States their property is not taxable by the State authorities. The ordinary State laws relating to schools, marriage, divorce, administration of estates, and the like, are not extended to, observed, or enforced among them. As respects all their internal concerns, they are governed and regulated by the laws and customs of the tribe.

[275] The inquiry is neither uninteresting nor unimportant, as to whether the general government or the State has legislative control over this people; and if both, whether the power is concurrent, and if not, where is the boundary line, marking where the control of the one ends, and where that of the other begins? This inquiry it is our duty to answer so far as the record in the case requires it.

It is necessary to examine into the acts of Congress relating to offenses committed by Indians, into the treaty stipulations of the United States with the Pawnees, and into the acts of Congress respecting the powers and jurisdiction of the State of Nebraska.

Nebraska was organized as a Territory, by the Act of May 30, 1854, and by that act (§§ 1 and 37) the rights of Indians therein are preserved unimpaired, and the authority of the United States to make regulations respecting them, their property, and other rights, by treaty, law, or otherwise, retained. The Pawnee tribe then, as now, resided within the limits of the Territory thus created.

On the 24th day of September, 1857, the Pawnees ceded by treaty, of that date, their lands in the Territory of Nebraska to the United States, reserving, however, out of the cession, a "tract of country thirty miles long from east to west, and fifteen miles wide from north to south." (11 U. S. Stats. 729.) This is the reservation described in the indictment. This treaty provides that the United States agents may reside on the reservation; that the government may build forts, etc., therein; that the whites may open roads through it, but shall not reside therein; that the Indians shall not alienate the lands except to the United States; that all offenders against the laws of the United States shall be delivered up, etc.; but it contains no

stipulation as to the jurisdiction over it, or over the Indians residing therein, when the Territory shall be admitted as a State.

On the 19th day of April, 1864, Congress passed an act to enable the people of Nebraska to form a State constitution. [276] In 1866, a State constitution was formed, and in 1867 Congress passed an act for the admission of Nebraska, under its constitution, into the Union, "upon an equal footing with the original States, in all respects whatever." There is no exception in the State constitution, or in either of these acts of Congress of the Pawnee reservation, or the Pawnee Indians, from the territorial or civil jurisdiction of the State. So that we have before us the case of Indians maintaining the tribal organization, which is recognized in the treaty by the general government, but living upon a reservation which is now within the limits of a State, and respecting which, or the Indians occupying it, there are no special provisions granting or retaining jurisdiction in favor of the United States, or withdrawing the Indians from the jurisdiction of the State.

It will be observed that the present indictment is not for an offense committed by Indians against an inhabitant of the State *upon the reservation*, and hence we have no occasion to inquire whether for such offense the courts of the United States or those of the State of Nebraska have jurisdiction; nor whether it would be competent for Congress in such a case (in the absence of any cession of jurisdiction by the State) to invest the national courts with cognizance thereof. (See on this point: *The United States v. Bailey*, 1 McLean, 234, 1834, and the case therein referred to against two Indians for the murder of Davis in the Cherokee country within the limits of a State; *United States v. Ciska*, 1 McLean, 254, 1835; *United States v. Ward*, opinion of Mr. Justice Miller, McCahon, 199, 1863; S. C. 1 Woolw. 17; *United States v. Gleason*, opinion Miller, J., McCahon, 206; S. C. 1 Woolw. 129; *United States v. Rogers*, 4 How. 567, 1846; *United States v. Holliday*, 3 Wall. 407. Compare, *The Kansas Indians*, 5 Wall. 737; and remarks of Davis, J., *arguendo*, p. 755; *The New York Indians*, 5 Wall. 761; *Worcester v. Georgia*, 6 Peters, 516; *The State of New York v. Dibble*, 21 How. 366.)

As to *State* authority over Indians, see also *Goddell v. [277] Jackson*, 20 Johns. 693, and constitutional provisions and Act of April 12, 1822, (2 R. S. 881), there cited; *Murray v. Wooden*, 17 Wend. 531; Swan's (Ohio) St. 304; R. S. Mass. 148; *Clay v. State*, 4 Kan. 49; *People v. Antonio*, 27 Cal. 404; *Hicks v. Ewhartona*, 21 Ark. 106; *Case of Peters*, 2 Johns. Cas. 344; *McCracken v. Todd*, 1 Kan. 148. It will appear from these authorities and citations that New York, Ohio, and other States have at different times passed acts declaring that their civil and criminal jurisdiction extended to Indians and to Indian reservations; and that such legislation has been considered valid when not in conflict with some treaty or constitutional act of Congress.

The *locality or place* where the homicide now in question is alleged to have been committed is confessedly within the territorial limits of the State. It is settled that there are no common-law offenses cognizable by the courts of the United States; that before these courts can take cognizance of an offense, it must be declared such by an act of Congress; and that it is not competent for Congress to enact a criminal code, punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States upon the high seas, or within the national domain beyond the limits of any State, or the places over which Congress has exclusive jurisdiction. The offense charged in the indictment is murder, and we now inquire whether there is any act of Congress which confers or undertakes to confer jurisdiction upon the national courts for a homicide committed under the circumstances of the one under consideration.

There are two statutes relating to murder cognizable by the United States courts—the statute of 1790 and that of 1825. The former act provides that if any person shall “within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States” commit the crime of wilful murder etc., he shall be punished, etc.

[278] The latter act declares “that if any person upon the high seas, or any river, etc., within the admiralty and maritime juris-

diction of the United States, and out of the jurisdiction of any particular State," shall commit wilful murder, etc., he shall suffer death. It is scarcely necessary to remark that the case at bar falls within none of the provisions of either of these statutes. These do not undertake to punish murder generally, but only when committed at a place within the exclusive jurisdiction of the United States.

If other provisions do not exist, it is evident that the court has no cognizance of the case made in the indictment.

We have been referred to the Intercourse Act of 1802 (2 U. S. Stats. 137, 143, §§ 14, 15), by which Congress defined the "Indian country," and provided for the punishment by the United States courts of Indians who left the Indian country and committed offenses in any State or Territory. It must have escaped the attention of counsel that this act, so far as it relates to Indian tribes *west* of the Mississippi, was repealed as long ago as June 30, 1834. (4 U. S. Stats. 728, § 29.) As it will not be maintained that a prosecution can be supported under a repealed statute, we need give it no further attention.

The jurisdiction of the court is also sought to be sustained under the Act of June 30, 1834, just cited. By the first section of that statute it is enacted "that all that part of the United States west of the Mississippi, and not in the States of Missouri and Louisiana, or the Territory of Arkansas, shall be taken and deemed to be the Indian country." By a subsequent section the Indian country is annexed, part to the judicial district of Arkansas, and the rest to the judicial district of Missouri. The twenty-fifth section is in these words: "So much of the law of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: *provided*, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

[1879] At the time this statute was enacted it applied to the locality where the offense in question was committed; but it ceased to be operative within the limits of Nebraska, at the moment when the latter was admitted into the Union as a State upon equal footing with the original States. This was the precise point decided by Mr. Justice Miller, in the *United States v.*

Ward, supra, and it is quite unnecessary to enlarge upon it, or repeat the reasons by which this conclusion is supported. That was an indictment of a white man for the murder of a white man committed on an Indian reservation *within the State of Kansas*, and it was held that the national courts had no jurisdiction, and the opinion expressed that the State courts had.

In the *United States v. Bailey*, 1 McLean, 235, a case is referred to in the Tennessee district, where, in 1816, two Indians were indicted in the United States circuit court for the murder of a white man, *on a reservation*, in the Cherokee country, *within the limits of the State*; and this decision in the Tennessee case was the occasion of the passage of the Act of 1817 (3 U. S. Stats. 383), which (after the decision of the *Bailey Case*, was repealed, 4 U. S. Stats. 729, § 34), whereby Congress provided for the punishment in the national courts of offenses committed by Indians or others, upon Indian lands within State limits. The decision referred to would preclude this court from taking jurisdiction in the case at bar had the homicide been committed by the defendants *within the limits* of the reservation; but, as before remarked, the court has no occasion to decide this point or give any opinion respecting it. But if it could not take cognizance of offenses committed upon the reservation, it surely cannot of those committed beyond its limits.

And it seems impossible to hold that the court has jurisdiction in the case without necessarily implying that the courts of the State have not; and if they have not, then we decide that the State of Nebraska has not the power to make her ordinary criminal statutes co-extensive with the State [280] limits, and enforce them against all persons living or found therein; Such a power we are not prepared to deny to the State in the absence of some controlling treaty stipulation or valid act of Congress.

No statutes, other than those above noticed, have been referred to by counsel, as giving the court jurisdiction in the present case; and these we hold do not confer it. This conclusion is supported by many of the cases before cited, and is opposed to none of them. Of its correctness the court entertains no doubt. In view of the peculiar relations which the general government sustains to the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the

opinion which Mr. Justice McLean seems to have entertained in *Bailey's Case* that Congress had no power to pass the Act of 1817 (3 Stats. 383), that is, that Congress could not if it saw fit make punishable in the national courts offenses committed by or against Indians *upon reservations in State limits*. And it might be worth the consideration of Congress whether some such legislation might not be expedient. But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with the Indian tribes (*Worcester v. Georgia*, 6 Peters, 515, 569), Congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a State, entirely from State jurisdiction and the reach of its criminal laws and process, for offenses against its citizens committed off a reservation, it would seem most improbable that such a power would ever be exercised. We have seen that in point of fact Congress has not undertaken to exercise it, and, therefore, this court, which can take cognizance only of offenses created by some act of Congress, has no jurisdiction of the crime charged in the indictment. The defendants must be discharged.

Under the circumstances of the case, the defendants having been convicted and entitled to be discharged only for a want of jurisdiction, and following the course pursued in a similar [281] case (*United States v. Cisna*, 1 McLean, 254), we deem it to be our duty to enter the following special order:—

Ordered, that the district attorney of the United States notify without delay the governor of this State, or the proper district attorney of this order; that the marshal retain the custody of the defendants, and safely keep them for the space of twenty days, within which time he will deliver them over to any authorized officer of the State, producing a writ for their arrest; if no such writ is presented within the time limited, he will discharge them from custody; or if they desire it, place them in the charge of the United States Indian agent or superintendent for the tribe to which they belong.

DUNDY, J., concurs.

Ordered accordingly.

Note. Jurisdiction of Federal Courts over Indians within State limits. — Cited, *Karrahoo v. Adams*, *post*, 847; *U. S. v. Bridleman*, 7 Fed. Rep. 897; *U. S. v. Martin*, 14 Fed. Rep. 828; *Ex parte Sloan*, 4 Sawy. 333, 334; *Danzell v. Webquish*, 108 Mass. 194.

KELLOM ET AL. v. EASLEY ET AL.

PRE-EMPTION ACT—ASSIGNMENT BY PRE-EMPTIONER.—Under the Act of Congress of September 4, 1841 (5 U. S. Stats. 453), relating to pre-emption of the public lands, and which in the twelfth section provides that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," a pre-emptioner, although he has a certificate of purchase, cannot, it seems, prior to the issue of the patent, convey the land.

CONVEYANCE BY PRE-EMPTIONER BEFORE PATENT ISSUED.—A conveyance made by a pre-emptioner before patent issued, and where his entry was set aside and no patent ever issued to him, was held to be incapable of operating, either by way of grant or estoppel.

BILL OF REVIEW—WHAT NECESSARY TO BE STATED.—A bill of review should state the former proceedings, and wherein the party exhibiting it considers himself aggrieved; the sufficiency of allegations in this respect considered and decided.

Before DILLON, J., and DUNDY, J.

HARRISON JOHNSON, under the Act of September 4, 1841 (5 U. S. Stats. 453), pre-empted; and in 1857 entered, by [222] virtue of that act, the premises in question in this suit; and afterwards, during the year last named, he conveyed the same, by absolute deed with warranty, to one Test, to secure a sum of money borrowed by him from Easley & Willingham, and for which he executed to them his promissory note. Test subsequently conveyed to Willingham. This debt to Easley & Willingham has never been paid. The land thus pre-empted by Johnson is near to, if not partly within, the city of Omaha, and that city contested before the land department of the United States, at Washington, the validity of Johnson's pre-emption right and entry, and such proceedings were had that Johnson's entry was vacated and set aside, and the land ordered to be sold at public sale by the local land officers at Omaha. Pending this contest, Johnson was embarrassed with debts, and it is quite probable that the order vacating his entry and directing the sale of the land was made with Johnson's consent if not in part by his procurement. The officers fixed upon the 18th day of August, 1860, for the sale of the one hundred and sixty acres on which Johnson had claimed the pre-emption right. His creditors met with a view to bid upon the land, which by this time had become of considerable value. Prior to the sale a meeting of Johnson and his creditors was held, at which John-

son made, in substance, this proposition: "Surrender and cancel your claims against me and you may bid in, without opposition from me, one eighty of this land, and then you must let my mother bid in the other eighty without opposition from you."

Easley & Willingham, and also one Beers, claiming to be mortgagees, did not consent to this proposition, because the other creditors would not recognize their priority, and insisted that all the creditors should stand on an equal footing, and these mortgage creditors left the meeting before the final agreement was concluded between the assenting creditors and Johnson.

That agreement was reduced to writing on the morning of the day on which the sale was to take place, and was signed [see] by Johnson and nine of his creditors; the mortgagees and certain other creditors, absent or not assenting, and representing about one half in amount of Johnson's debts, did not sign the contract, or come into the arrangement. By this contract the creditors executing it agreed that the principal sum and ten per cent interest should be the basis for ascertaining the amount due to them severally by Johnson; three persons were named as "a committee, whose duty it should be to ascertain the just amount due from Johnson on the above basis, which shall be deemed the true amount, and from whose finding there shall be no appeal"; the creditors were to present their claims to the committee without delay, "with such evidences as they may have of the genuineness thereof, in default whereof the creditors so in default shall be debarred from any benefit under this agreement, and the said Johnson shall be forever discharged from all liability to them, and the benefits which they would have derived shall revert and go to the said Johnson."

By the contract, it is provided also, that Kellom, one of the creditors, should buy in one eighty in trust for himself and the other creditors, to be divided between the creditors in proportion to the amount of their claims as found due from Johnson to them by the committee in the manner above stated.

The sale took place; Kellom bought in one eighty at the minimum price, and Mrs. Johnson the other, at the same price.

One of the creditors, Smith, who signed the agreement, presented his claim, evidenced by a promissory note, to the com-

mittee. The committee required from him additional evidence of his debt, which, failing to produce, his claim was not allowed by the committee. It amounted to one thousand and thirteen dollars and constituted, in round numbers, one ninth part of the aggregate sum of the claims of all the creditors, who signed the contract.

Kellom shortly afterwards conveyed to the creditors who signed the contract, excepting Smith, all of the eighty acres, except ^[284] the parcel retained by him, on account of his own debt. That is to say, the eighty was partitioned between Kellom and the other creditors who signed the contract, excluding Smith. In the partition it was considered that Smith had no right, and that Johnson was not entitled to the share that would have fallen to Smith, had his debt been recognized by the committee.

Afterwards, namely, in July, 1863, Willingham & Easley filed their bill against Johnson, Kellom, and others, claiming that they were mortgagees of Johnson by reason of the deed from him to Test and from Test to Willingham, as before recited. They also claimed the contract between Johnson and the creditors was that the eighty bid in by Kellom was to go to pay *all* of the debts of Johnson, whether the creditors' names were affixed to the contract or not, and that if any of the creditors should not come in, that Johnson was to have such portion of the eighty acres as would have fallen to such, had they acceded to the arrangement, that one half the amount did not come in, and hence, on this theory, Johnson was entitled to one half of the land, and they, Willingham & Easley, as mortgagees, were entitled to a decree of foreclosure as against this interest. Kellom and the other defendants resisted this bill; testimony was taken; the original agreement was not produced, nor any copy thereof; secondary evidence of its contents was given, and at the May term, 1867, of this court, a decree was passed by the then presiding district judge, sustaining the view of Willingham & Easley, holding that Johnson was entitled to an undivided half of the eighty acres purchased by Kellom, and that W. & E.'s mortgage was a lien upon this interest, and subjecting it to the payment of the mortgage debt.

In the November following, Kellom and others (defendants to

the original bill), filed the *present bill of review*, making Easley & Willingham, and others, defendants thereto.

In the bill of review it is alleged that the decree is erroneous on the face thereof, in certain particulars specified, and it is [285] particularly alleged that the complainants therein have, since the decree was made, discovered for the first time a copy of the written contract of August 19, 1860, between Johnson and his creditors, and that this establishes the agreement to be as they maintained it was, and not as found by the decree of the court. Answer is made and testimony is taken upon the bill of review. What purports to be a copy of the agreement between Johnson and nine of his creditors is produced, and this shows that the contract was made between Johnson and "certain of his creditors," not all of them, and that only those who signed were to be entitled to its benefits. Among others it is signed by the creditor, Smith, whose claim the committee rejected, as before mentioned. The other necessary facts are stated in the opinion.

Daniel Gantt, for the Complainants.

J. M. Woolworth, for the Defendants.

DILLON, *Circuit Judge*.—1. If Willingham & Easley have no lien on the land which they are seeking to subject to their debt against Johnson, or if Johnson has no interest in this land, in either event their bill to foreclose cannot be maintained.

The first inquiry is: Have Willingham & Easley any lien on the land in question? The basis of their claim to a lien is the deed from Johnson to Test. Johnson, it will be recollected, pre-empted the land under the Act of Congress of September 4, 1841, and after he had entered it, and before his entry was cancelled by the department, he made the deed to Test. This deed is absolute in form, and contains covenants of warranty. It was in fact a mortgage, having been made to secure money borrowed by Johnson of Willingham & Easley. *No patent was ever issued to Johnson under his pre-emption and entry.* Subsequently, the land in question was sold by the United States to Kellom at the time and under the circumstances appearing in the statement of the [286] case. It is claimed by Kellom and those whose interests are adverse to Willingham & Easley, that the latter

have no lien, because the deed from Johnson, which is relied on to create such lien, is absolutely void.

This objection is based upon and involves a construction of section 12 of the aforementioned Act of September 4, 1841, which provides that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

Does this intend to prohibit the pre-emptioner from all alienations of the property acquired under the pre-emption act, prior to the issuing of the patent? Or does it intend simply to prevent the transfer of the right to pre-empt? That it means the former was, by MR. JUSTICE MILLER, expressed to be his opinion in the case of *Beers' Executor v. Kellum et al.*, decided in this court and arising out of the transaction now in controversy. This view seems to be the one best sustained by the terms of the statute, which, when plain, should be regarded by the courts and not frittered away by subtle refinements.

Until payment made for the land and certificate of purchase obtained, the pre-emptioner has nothing which he could assign or transfer. If after certificate of purchase is obtained, there was intended to be no restriction on the disposition of the land by the pre-emption purchaser, why did the act use the words "prior to the issuing of the patent"? If such restriction was intended, how apt the use of the words last quoted.

The other view is that the "right secured" is the right to pre-empt, that is, to purchase the land on certain terms and conditions preferably to others, and this right is fully secured when the purchase is made of the United States. The right thus preferably to purchase, it is admitted, cannot be transferred, and it is this alone (it is argued) which is prohibited. If so, why did the statute use the words, "prior to the issuing of the patent," instead of prior to the issuing of the certificate?

[237] The object of the government was in part to induce settlements upon the public lands, but chiefly to confer the preferable right to purchase upon those persons, usually in indigent circumstances, who actually settled or improved them. It was not to aid the speculator in lands. (*Marks v. Dickson*, 20 How. 501, 505.) It is plain that pre-emption merely for purposes of speculation will be less likely to be made if the pre-

emptor is obliged before alienating to wait for the patent to issue.

Again: there was a similar provision in the prior Act of the 20th of May, 1830 (4 Stats. 320, § 3.) The language of the two acts, in this respect, is almost literally the same. By the Act of January 23, 1832 (4 Stats. 496), the prohibition as to assignments and transfers of the right of pre-emption, contained in the Act of 1830, is removed, and it is provided that "all persons who have purchased lands under the Act of May 29, 1830, may assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee, anything in the act aforesaid to the contrary, notwithstanding."

This shows that the language in question was understood by Congress as restricting alienations by the pre-emptor after payment and before patent issued.

The effect of allowing such transfers was seen to be such that Congress, in passing the carefully framed Act of Sept. 4, 1841, renewed the prohibition against transfers, which was contained in the Act of 1830. The government had witnessed the practical operation of the two opposite policies, and the judgment of Congress, as embodied in the latter act, as to which is the better policy, should be respected by the courts, and the language of the statute should be allowed its natural and fair meaning.

Our attention has been called to no decision of the supreme court of the United States upon the point under consideration, and it is presumed it never has been determined by that tribunal. (*Thredgill v. Pintard*, 12 How. 24, and *Marshall* [233] v. *Bush*, 6 How. 284, are referred to by counsel, but the question now before us is one which, it is evident, was not ruled by the court in either of those cases.

The question has, however, been frequently before the State courts, and they have with very great uniformity held that the pre-emptioner had no transferable right prior to the issuing of the patent. (*Arbour v. Nettles*, 12 La. An. 217; *Poirrier v. White*, 2 La. An. 934; *Penn v. Ott*, 12 La. An. 16, 233; *Stanhrough v. Wilson*, 13 La. An. 494; *Stevens v. Hays*, 1 Ind. (Cart.) 247; *M'Elyea v. Hayter*, 2 Port. 148; *Cundiff v. Orms*, 7 Port. 58; *Glenn v. Thistle*, 23 Miss. (1 Cushm.) 42, 49; *Wil-*

kerson v. Mayfield, 27 Miss. (5 Cushm.) 542; *McTyer v. McDowell*, 36 Ala. 39; *Paulding v. Grimsley*, 10 Mo. 210; *contra*, *Randall v. Edert*, 7 Minn. 450.)

If this is the true view of the statute, the deed from Johnson to Test was null and void, and neither by reason of the grant it purported to make, or the covenants it contained, can it operate as an estoppel; and any subsequent interest acquired by Johnson would not inure to the benefit of the grantee named in the deed. (*Stevens v. Hays*, and *M'Elyea v. Hayter*, *supra*, are express authorities on this point.)

To hold otherwise would enable parties easily to evade the statute, and defeat its policy and purpose; would contravene its plain language, and involve the legal absurdity of making an instrument declared by the law to be null and void, operate as effectually as if it was not under the ban of the statutable prohibition.

But it is not necessary in this case to deny that the title which a pre-emptioner gets by virtue of his patent will inure to the benefit of a grantee to whom he conveyed prior to the issue of the patent although the foregoing argument may go to that length. In the case at bar the pre-emptioner's entry was cancelled and he never obtained any patent, and we feel quite clear in holding, as we do, that under these circumstances the conveyance by way of mortgage made by Johnson, when a pre-emptioner, will not attach to an interest subsequently acquired by an independant purchase.

[339] 2. But it is insisted that, if the prohibition of the statute is applicable to the deed from Johnson to Test, it cannot avail the parties filing the bill of review, because they have not therein complained of this error in such a way as to apprise the defendants of their claim in this respect. (Story Eq. Pl. § 420; Story Eq. Pl. § 636; 3 Daniel Ch. Pr. 1729.)

The bill of review states the former bill, answer, and replication, and the proceedings thereon, and the decree entered therein. By the pleadings in the original cause it distinctly appears that Johnson's entry was made under the pre-emption act, and that the complainants therein claimed under the deed from Johnson to Test, and that the respondents set up as defense its invalidity, because made in violation of the provisions of the Act of Congress of September 4, 1841.

The court affirmed the validity of the deed, and held that it operated by estoppel upon the interest which Johnson subsequently acquired, and subjected that interest to sale.

The bill of review alleges that the decree of July, 1867, "is erroneous, and ought to be reviewed, reversed, and set aside, for that, it appears by the said decree, this court declared (1), that under the pleadings in this cause the said deed of conveyance from said Harrison Johnson to said James D. Test, in the said bill and decree mentioned, was a security for and operated as a mortgage of the premises therein mentioned; (2) that said Johnson had such title and interest in and to said lands in said bill and decree mentioned, as to give him a valid right to convey the same, and vest a valid right and interest in and to the said lands in his vendee; (3) that the alleged agreement in the said bill and decree mentioned was in law valid and effectual, and subject to be enforced in law as between the parties."

When these allegations are examined in connection with the language of the pleadings and decree, it is seen that they are reasonably specific as to the ground on which it is sought to impeach the decree.

This disposes of the case, and the result is that the prayer of the bill of review must be granted.

[200] It may be added that a careful examination of the evidence has satisfied the court that the writing produced is a true copy of the original agreement, and being so, Johnson has no interest in the lands, except what he would be entitled to, if any, by reason of the rejection of the claim of Smith; and it may also be added that we are inclined to the opinion that Smith's claim was improperly rejected.

Let a decree be drawn up in conformity with this opinion, reversing and setting aside the former decree.

DUNDY, J., concurs.

Decree accordingly.

Note. Judgment affirmed on appeal, 14 Wall. 279.

SANDS v. SMITH.

REMOVAL OF CAUSES—ACT OF MARCH 2, 1867.—A non-resident plaintiff, who brings his action at law in a State court against a citizen of the State in which the suit is brought and a citizen of another State, the latter of whom voluntarily appears, is entitled, by complying with the Act of Congress of March 2, 1867 (14 U. S. Stats. 558), to have the cause removed as to all the defendants, to the proper circuit court of the United States.

ID.—The various acts of Congress relating to the removal of causes from the State to the federal courts, discussed by DILLON, C. J.

ID.—**PRACTICE.**—Practice on the removal of causes, and requisites of affidavits for the removal. (See note, *post.*)

Before DILLON, J., and DUNDY, J.

THE plaintiff, William G. Sands, is a citizen of the State of New York; the defendants, Charles B. and Julia A. Smith are citizens of the State of Nebraska, and the other defendant, Lydia A. Salisbury, is a citizen of the State of Missouri. The plaintiff, in April, 1868, brought an action against the above-named defendants in one of the State courts of Nebraska. In May, 1869, and before final hearing or trial, the *plaintiff* filed his petition in due form, in the State court, for the removal of the cause to the [291] circuit court of the United States for the district of Nebraska. He also filed in the State court an affidavit, pursuant to the Act of Congress of March 2, 1867 (14 U. S. Stats. 558), stating therein that he has reason to believe and does believe, that, from prejudice or local influence, he would not be able to obtain justice in the State court, and offered the requisite surety for his entering copies, etc., in the United States court. Subsequently, on the application coming on to be heard, the State court made an order transferring the cause to the circuit court of the United States.

In this court a motion is now made by the defendants to remand the cause to the State court for the reason that, under the circumstances above stated, the order for the removal was erroneously made. It is properly shown that the amount in dispute exceeded five hundred dollars, exclusive of costs. The action is founded upon a joint and several promissory note signed by the defendants, Smith and wife, and Lydia A. Salisbury and her deceased husband. The Smiths pleaded usury and payment; this payment being alleged to have been made by

the receipt by the plaintiff of rents and profits of certain premises mortgaged to secure the notes.

Under the State practice, Mrs. Salisbury pleaded, by way of counter-claim or in the nature of a cross action, an equitable defense, and prayed for affirmative relief. She sets up, in substance, that she and Mrs. Smith borrowed the money of the plaintiff for which the note in suit was given, mortgaging a tract of land which each owned in severalty, and also a tract which they owned in common; that the plaintiffs heretofore obtained in the State court a decree of foreclosure for accrued interest on the note in suit; that this decree was void for want of jurisdiction as to the said Lydia; that the plaintiff bought in the property under the decree, and has since been in possession, receiving the rents and profits, which are alleged to be more than sufficient to pay the debt, and she prays that an account may be taken of the amount due the plaintiff on the note and of the rents and profits received, [202] and that she may be allowed to redeem the premises from the mortgage, if anything is due thereon.

J. M. Woolworth, for the Motion.

Redick & Briggs, contra.

DILLON, *Circuit Judge*.—By the constitution, the judicial power of the United States extends “to controversies between citizens of different States.”

In prescribing the jurisdiction of the circuit court of the United States, the judiciary act did not confer it as broadly as it might have done under the constitutional provision just quoted, but limited it to cases where “the suit is between a citizen of the State where the suit is brought and a citizen of another State.” (§ 11.) Under this provision, one of the parties, either the plaintiff or defendant, it matters not which, must be a resident of the State where the suit is brought, and the other not. In other words, it must be a controversy or suit between a resident and a non-resident citizen. The next section of the judiciary act (§ 12), provides for the removal of causes, under certain circumstances, from the State courts to those of the United States. Until very recently this was the only statute authorizing the removal on the ground of citizenship of the parties. It author-

ized the removal by the defendant (under limitations therein mentioned), where the suit is commenced in the State court "by a citizen of the State in which the suit is brought against a citizen of another State." That is, if the suit is by a resident plaintiff, the *non-resident defendant* may have it removed; but the resident plaintiff could not. Under section 11 of the judiciary act, a *non-resident plaintiff* might sue in the circuit court a *resident defendant*; but if the non-resident plaintiff elected to sue in a State court, section 12 of that act would give *neither* party the right to remove the cause from the State court to the United States court. The plaintiff was not given the right because he had ^[2008] voluntarily selected the State court in which to bring his action; the defendant was not given the right because it was not supposed that *he* would have any grounds to object that he was sued in the courts of his own State. So that the right of removal by the judiciary act is limited to the non-resident defendant when sued by a resident plaintiff in the courts of the State.

By section 11 of the judiciary act, as we have seen, the circuit court has jurisdiction when the suit is between a citizen of the State in which it is brought, and a citizen of another State. This was construed by the courts to mean that if there were several plaintiffs, and several defendants, each one of each class must possess the requisite character as to citizenship. (*Strawbridge v. Curtiss*, 3 Cranch, 267; *Coal Co. v. Blatchford*, 11 Wall. 172.) For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs in suing in New York a citizen of Massachusetts, if found in New York, because the plaintiffs were not each competent to sue, for the citizen of Georgia could not, under section 11 of the judiciary act, sue a citizen of Massachusetts in New York. (*Maffut v. Soley*, 2 Paine, 103.)

But other and greater difficulties were experienced. By section 11 of the judiciary act it is also enacted that "no civil suit should be brought in any other district than the one whereof the defendant was an inhabitant, or in which he shall be found at the time of serving the writ." By the common law all parties jointly liable must be jointly sued and brought into court, and if any of them resided out of the district where the

suit was brought, or in the State in which the plaintiff resided, the national court was deprived of jurisdiction.

To remedy this the Act of February 28, 1839 (5 U. S. Stats. 321), was passed. This statute will be referred to more at large hereafter.

In my opinion, it gives the citizen of one State the right to commence suit in the circuit court of the United States in ^[294] any other State against such persons as reside there, and the jurisdiction of that court is not defeated by the circumstance that other persons (proper, but not necessary, defendants) reside in some other State. Under section 12 of the judiciary act above quoted, regulating removals, it was held that a cause could not be removed unless *all* the defendants asked for it; that to bring the case within the act *all* the plaintiffs must be citizens of the State in which suit is brought, and *all* of the defendants must be *citizens* of some other *State or States*. (*Beardsley v. Torrey*, 4 Wash. 286, 1822; *Ward v. Arrendondo*, 1 Paine, 410, 1825; *Hubbard v. N. R. R. Co.* 3 Blatchf. 84; S. C. 25 Vt. 715, 1853; *Smith v. Rines*, 2 Sum. 338.) But this rule does not apply to persons who were mere nominal or formal parties. (*Browne v. Strode*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat. 421; *Ward v. Arrendondo*, *supra*; *Wood v. Davis*, 18 How. 467.)

It will be borne in mind that the Act of February 28, 1839, above mentioned, authorizes suits against defendants who might be non-residents of the district in which suit is brought, or not found therein, and that the plaintiff might proceed to judgment against those served, and against such non-resident defendants as should voluntarily appear.

Under this act a citizen of New York may, as in the case at bar, sue a citizen of Nebraska in the United States circuit court sitting in the latter State, and may also make a citizen of Missouri a party defendant; and if the latter is found within the district of Nebraska, or voluntarily appears, the suit may proceed to trial and judgment against all. So that it is not true, as argued by the defendants, that this suit could not originally have been brought in the circuit court of the United States for the district of Nebraska; and hence by allowing its removal the court does not get cognizance of a cause which could not in

the first instance have been brought therein. But if this were so, it would not *necessarily* follow that the right of removal did not exist; for the circuit court may by *removal* acquire jurisdiction of a cause which could not ^[2008] have been *commenced* therein. (*Sayles v. Northwes. Ins. Co.* 2 Curt. 212; *Bliven v. N. E. Screw Co.* 3 Blatchf. 111; *Barney v. Globe Bank*, 5 Blatchf. 107; S. C. 2 Am. Law Reg. (N. S.) 221.)

Such being the law and the construction of the courts, Congress passed the Act of July 27, 1866 (14 U. S. Stats. 306), entitled "an act for the removal of causes in certain cases from the State courts." This act provides for removal in cases where the citizenship of the defendants is different. It contemplates cases where the *plaintiff* in the State court is "a citizen of the State in which the suit is brought," following in this respect the language of section 12 of the judiciary act. But it enlarges the provisions of the judiciary act in that it contemplates the case of several defendants, some residing in the State in which the suit is brought, and some in a State other than that in which suit is instituted; and it authorizes in certain cases the *non-resident defendant* to have the cause removed *as to him* and to proceed in the State courts as to the resident defendant. The effect of the statute is plain; without it no removal could be made because *all* the defendants were not within the act, and under the ruling of the courts before mentioned, unless the cause was removable as to all it was not removable as to any. But as in the judiciary act, the right of removal is confined by the Act of July 27, 1866, to cases where the plaintiff is a resident and the defendant a non-resident, and is limited to the *foreign defendant* and does not extend to the plaintiff.

We now come, in the progress of this discussion, to the Act of March 2, 1867 (14 U. S. Stats. 558), upon which the right of removal in the case at bar is claimed, and which is the first act that in any event extended the right to plaintiffs. It professes to be an *amendment* to the Act of July 27, 1866, last noticed, and it extends the right, in the cases provided for, as well to *plaintiffs* as to defendants, but confines it to such as are *non-residents* of the State in which the suit is brought, and makes the ground of removal not alone the citizenship of the parties, but prejudice or local influence.

[296] The act provides, "that where a suit is now pending or may hereafter be brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, . . . such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State courts an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State court," may have the cause removed to the circuit court of the United States.

It will be seen that as to the plaintiff this follows the language of section 11 of the judiciary act, and not of section 12 of that act; the plaintiff may or may not be a resident of the State where the suit is brought; and the right of removal is given to the non-resident party, be he the plaintiff or defendant. Speaking of the act, Mr. Justice Miller, in a case in this court, *Johnson v. Monell*, 1 Woolw. 390, says: "The only conditions necessary to the exercise of the right of removal are:—

"1. That the controversy shall be between a citizen of the State in which the suit is brought, and a citizen of another State.

"2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs.

"3. That the party citizen of such other State shall file the required affidavit stating, etc., the local prejudice.

"4. Giving the requisite surety for appearing in the federal court. . . . Congress intended to give the right in every case where the four requisites we have mentioned exist."

In that case the plaintiff was a citizen of Iowa, one defendant was a citizen of Nebraska, and the other of New York, but the last was not served with process and did not appear, and it was held that the plaintiff was entitled, under the act of March 2, 1867, to have the case transferred from the State court to the United States court, after a verdict of the jury in the State court in his favor had been set aside by the court.

[297] Taking the Act of March 2, 1867, in connection with the Act of February 28, 1839, and July 27, 1866, we are of the opinion that it was the intention of Congress to give (on the enumerated conditions) a non-resident plaintiff the right to

remove the cause from the State court, where the adverse parties are citizens of the State where the suit is brought; and this right is not defeated by the circumstance that some one of the persons made a defendant under the Act of 1839 may be a citizen of a State other than that in which the suit is brought. This seems to the court to be the spirit and manifest purpose of the legislation in question. It is the supposed local influence or prejudice that forms the basis of the right of removal in favor of the non-resident. As against the Smiths, if sole defendants, it is conceded that the right would exist. As respects the defendant Salisbury, we have seen that suit might have been brought against her and the Smiths in the circuit court. She is deprived of no right by holding in favor of the removal, and it seems to us to be an extremely technical construction to hold that the right of removal depends upon the circumstance that all the defendants are residents of the State in which suit is brought.

The Act of March 2, 1867, construed in the light of previous legislation and decisions, in its terms covers the case; and if so, this court has jurisdiction over it. This is put very plainly by an eminent judge in speaking of a cause removed under section 12 of the judiciary act: "But the jurisdiction (of the United States circuit court) over this case does not depend upon the eleventh but on the twelfth section of the judiciary act. If it be a suit which that section authorized the defendant to remove, it empowers this court to take jurisdiction over it when removed." (Per Curtis, J., *Sayles v. N. W. Ins. Co.* 2 Curt. 212.)

The view on which the motion to remove is based is that maintained in the early case of *Strawbridge v. Curtiss*, 3 Cranch, 267, and overlooks the modifications which the subsequent legislation adverted to has made. (See *Louisville Railroad* ^[200] *Co. v. Letson*, 2 How. 497, 556; *Heriot v. Davis*, 2 Wood. & M. 229; *Taylor v. Cook*, 2 McLean, 516; *Doremas v. Bennet*, 4 McLean, 224.)

It is to be remembered that the plaintiff's action is upon a joint and several promissory note, and that he seeks only to recover an ordinary personal judgment upon it against the makers. The case is one in which the plaintiff might origin-

ally have sued in this court, making the Smiths and Mrs Salisbury defendants. It is precisely such a case as the Act of 1839 contemplated.

Mrs. Salisbury voluntarily appeared in the State court, and answered to the action. The circumstance that she pleads as a defense (under the State practice) matters which properly constitute grounds for a bill in equity, cannot defeat the right of removal, if this right otherwise exists, and that it does exist, we have above endeavored to show. The motion to remand is denied, but as in this court law and equity must be kept separate, it is suggested that it may be advisable for the parties to reform the pleadings so as to adapt them to the practice of this tribunal.

DUNDY, J., concurs.

Motion denied.

[NOTE—The equitable defense of Mrs. Salisbury, pleaded in her answer filed in the State court, was subsequently made the subject-matter of a bill in equity filed in the circuit court, and as the plaintiff Smith was a non-resident of the district, the court made a special order allowing service to be made upon his attorneys of record prosecuting the action at law on the note.

The Act of March 2, 1867, provides that if "such citizen of another State will make and file an affidavit stating that he has reason to believe, etc., it shall be the duty of the State court to accept the surety," etc. Construing this act, it was in another case held by DILLON, J., and DUNDY, J., that an affidavit of the plaintiff's attorney stating "that the plaintiff had reason to and does believe that from prejudice or local influence he will not be able to obtain justice in the State court," was insufficient to authorize that court to order the removal, and if ordered, the cause on motion would be remanded to it. In the same case it was also held that the facts showing the [299] reasonableness of the party's belief and the existence of the local prejudice need not be stated in the affidavit, which is sufficient in these respects, if it follows the general language of the act. Whether under this act an attorney could, in any case, make the affidavit was not decided; but if so, it is perhaps advisable that the reason why it is not made by the party himself should appear.

Requisites of petition for removal. (*Sweeney v. Coffin*, ante, 73.) Practice. *McBratney v. Usher*, post.]

Actions Between Citizens of Different States or with non-residents are removable to federal courts.—*Case v. Douglas*, post, 300; *Florence Co. v. Grover & Baker Co.* 1 Holmes, 245. Distinguished, *Case of Sewing Machine Companies*, 18 Wall. 587.

CASE ET AL. v. DOUGLAS ET AL.

REMOVAL OF CAUSES—ACT OF MARCH 2, 1867.—Under the Act of March 2, 1867 (14 U. S. Stats. 558), where the suit in the State court is brought by co-partners on a firm demand, the defendants are not entitled to have the same removed to the federal court on filing a petition and affidavit showing that a part of the plaintiffs are citizens of the State in which the suit is brought, and the defendants are citizens of another State; in such case, in order to authorize the removal, all of the plaintiffs should be shown to be citizens of the State in which the suit was brought.

Before DILLON, J., and DUNDY, J.

THIS is an action by D. W. Case, R. B. Beals, and H. H. Denton, partners, under the name of Case, Denton & Co., against the defendants, co-partners, under the name of Douglas, Brown & Co., to recover for work and labor performed by the plaintiff's firm for the defendants.

The action was commenced in 1869, in one of the State courts of Nebraska. After answer the defendants filed, under the Act of March 2, 1867 (14 U. S. Stats. 588), their petition to remove the action to this court.

The petition for removal sets forth *inter alia*, "that the plaintiffs, or at least the said D. W. Case, who is the active manager of said suit in behalf of said plaintiff, and the said R. B. Beals are citizens of the State of Nebraska, and that the defendants are citizens of the State of Iowa; that the matter in dispute exceeds, etc., and that by reason of prejudice [see] and local influence, the defendants will not be able to obtain justice in the district court of the State," etc.

The State court ordered a removal of the cause as prayed, and in this court the plaintiffs now move to remand the same "because the petition and affidavit do not show that the federal court has jurisdiction, inasmuch as all the parties plaintiffs do not appear to be citizens of the State of Nebraska."

George W. Doane, and John Carrigan, for the Motion.

Isaac Cook, contra.

DILLON, *Circuit Judge*.—The motion to remand must be granted. The application for removal was based upon the Act

of March 2, 1867 (14 U. S. Stats. 558). This act provides, under certain circumstances, for such removal where "there is a controversy between the citizen of the State in which the suit is brought, and a citizen of another State."

This language is taken from the judiciary act, and so far as respects the question now presented, its meaning had been judicially determined long before the Act of March 2, 1867, was passed. In adopting that language in the later act, Congress must be taken to have adopted also its settled construction, which is that where the interest is joint each of the parties concerned therein must be competent to sue in the federal courts, and this competency must appear on the record. (*Strawbridge v. Curtiss*, 3 Cranch, 267; *Corp. New Orleans v. Winter*, 1 Wheat. 91; *Moffat v. Soley*, 2 Paine, 103; *Com. etc. v. Slocum*, 14 Peters, 60; *Irvine v. Lowry*, 14 Peters, 293; *Bank etc. v. Willis*, 3 Sum. 472; *Allin v. Robinson*, ante, 119; *Coal Co. v. Blatchford*, 11 Wall. 172; *Sands v. Smith*, ante, 290.)

Applying these principles to the present case, it is obvious that the removal was improperly ordered, since it does not appear that all of the plaintiffs were citizens of Nebraska. For aught that is shown one of them may be a citizen of the same State as the defendants.

[301] The case is distinguishable from that of *Sands v. Smith*, ante, where the right of removal given by the judiciary act was held to be affected by the Act of February 28, 1839, and of July 27, 1866 (14 U. S. Stats. 306), in relation to defendants.

DUNDY, J., concurs.

Motion granted.

Note. Removal to Federal Court on Ground of Citizenship authorized only when all plaintiffs are competent to sue all defendants in federal court.—Cited, *Petterson v. Chapman*, 13 Blatchf. 397; *Florence Co. v. Grover & Baker Co.* 110 Mass. 80.

WEBSTER v. CROTHERS.

REMOVAL OF CAUSES—JUDICIARY ACT—DEFAULT.—In cases properly removed here under section 12 of the judiciary act, the defendant is not in default for not having answered or pleaded in the State court before or at the time of filing his petition for the removal.

. Before DILLON, J., and DUNDY, J.

SUIT for specific performance of contract for the sale of lands, commenced in the State court by publication against the defendant, a non-resident. By the published notice or summons the defendant was required to answer on the 16th day of May, 1870, that being the first day of the May term. On that day the defendant appeared and filed his petition and the requisite bond for the removal of the cause to the United States circuit court for the district of Nebraska, and the next day the court ordered the removal. The defendant did not answer in the State court, or take any steps therein except to apply for the removal of the cause. On the first day of the next term of this court, the plaintiff moved for a default against the defendant for his failure to answer; and that is the question before the court.

Redick & Briggs, for the Motion.

Gannt & Wakley, contra.

[302] DILLON, *Circuit Judge*.—This removal was applied for and properly granted under the twelfth section of the judiciary act. It was applied for at the time the defendant was required to and did make his appearance. He was not bound to plead anterior to, or contemporaneously with, the filing of his petition for the removal of the cause. When the petition was duly made, the requisite facts entitling to a removal shown, and the surety offered, it became "the duty of the said court to accept the surety and *proceed no further in the cause*." The State court could not require or receive an answer after the removal was thus applied for, and hence there was no default on the part of the defendant in not answering in that court, and none for not answering in this court, since this is the first day of the

term occurring after the cause was transferred to it. The cause is in equity, and the defendant will be required to plead by the next rule day to the merits. If he desires to demur we order that he do so at this term.

DUNDY, J., concurs.

Ordered accordingly.

[NOTE.— Under section 12 of the judiciary act the right must be claimed when appearance is entered. (*Johnson v. Monell*, 1 Woolw. 390; *Sweeney v. Coffin*, ante, 63.) Therefore when the action in the State court is by consent referred and is continued, it is afterwards too late to have it removed under section 12 of the judiciary act. (*Robinson v. Potter*, 43 N. H. 188.) Practice. *McBratney v. Usher*, post.]

[303] PATRICK, ASSIGNEE, ETC., v. CENTRAL BANK
ET AL.

BANKRUPTCY OF PARTNERSHIP—FRAUDULENT CONVEYANCE—REMEDY.—Where real property purchased with firm means stands in the name of one of the partners, and the same is conveyed by him in fraud of the bankrupt act, the assignee of the firm may bring a bill to recover the property.

Before DILLON, J., and DUNDY, J.

THIS is a bill by the assignee in bankruptcy of Mackoy & Co. to have declared fraudulent a certain conveyance of real estate made to, or for the benefit of, the defendant by J. C. Mackoy (one of the firm) and his wife.

It is alleged in the bill that the property was purchased by J. C. Mackoy "with money belonging to the firm"; that the deed was taken in the name of his wife; that Mackoy and wife made the conveyance to the bank, or to its president, for the bank, in payment of a debt due to the bank by the firm, and that such conveyance was made and received in fraud of the bankrupt act, the bill duly alleging the facts which in law would show such fraud. There is no allegation that the individual members of the firm have been declared bankrupts, or that the plaintiff is their assignee, or that they have any separate property or separate creditors.

The demurrer to the bill presents the points that the plaintiff,

as the assignee of the firm, has no right to property sought to be reached by the bill, and no right to have inquired into the *bona fides* of the conveyance to the bank; that this is a matter which alone concerns the individual creditors of Mackoy.

Mr. Ambrose, for the Plaintiff.

Mr. Redick, for the Defendant.

DILLON, *Circuit Judge*.—This is a bill by the assignee of [304] the firm of Mackoy & Co. to have declared fraudulent a certain conveyance of real estate made for the benefit of the bank, by one of the members of the firm and his wife. The object of the bill is to obtain the property for the benefit of the creditors of the firm. The objection taken by the defendant, and the only one now to be considered is, that since the property sought to be reached was the individual property of one of the partners, the plaintiff, as the assignee of the firm, can have no right to the relief sought.

If the allegations of the bill be true, the demurrer is not well taken. The complainant alleges that the property in question was purchased “with money belonging to the firm of Mackoy & Co.” If so, then in equity the firm would own it, or have an interest in it, and it would not, as against the firm or their creditors, be the separate or individual property of Mackoy. Assuming these to be the facts, the interest of the firm would pass to the assignee, and he could maintain the bill, although Mackoy has never been individually proceeded against or adjudged a bankrupt. The demurrer is, therefore, overruled.

Whether, on the assumption that the property was the individual property of Mackoy, the assignee of the firm could, in any event, reach it, and if so, what ought to be alleged and shown, to entitle him to do so, are points that need not be considered, since the bill seems not to have been framed upon this basis, but on the one above stated.

DUNDY, J. concurs.

Demurrer overruled.

[NOTE. — As to rights of individual and firm creditors, see *Downing's Case*, ante, 83.]

[205] GARDEN CITY MANUF. COMPANY v. SMITH.

REMOVAL OF CAUSES COMMENCED BY ATTACHMENT—PRACTICE.—After a cause is removed from a State court to the circuit court of the United States, the latter court has the power, where such a practice is authorized by the State law, to entertain a motion to dissolve an attachment or discharge the attached property.

Id.—DISSOLUTION OF ATTACHMENT.—The circuit court may, in such case, in the exercise of a sound discretion and in furtherance of justice, hear such a motion, although a similar motion was made and overruled in the State court prior to the removal of the cause.

Before DILLON, J., and DUNDY, J.

THIS action was originally brought in one of the State courts, and removed here by the *plaintiff* under the Act of March 2, 1867 (14 U. S. Stats. 558). The action was commenced by the attachment of goods pursuant to the statutes of the State. The ground of the attachment was an alleged fraudulent disposition of his property by the defendant. In the State court and under the practice therein (authorized as counsel conceded by the statutes of the State), the defendant had, prior to the application for the removal, made a motion to dissolve the attachment and discharge the attached property from the levy under the writ. Upon this motion both parties took testimony at large in the form of affidavits, and the motion was thereon submitted to the State court and overruled. Copies of these affidavits are on file and entered with the other papers pertaining to the case. The plaintiff subsequently removed the cause to this court, and has on file a motion for a continuance till the next term, based upon the absence of material witnesses to prove its corporate character and the justice of its demands.

The defendant resists the motion for a continuance (because the suit ties up a large amount of property), unless the court will consider a motion he makes here, and which is in effect the same motion made in the State court, viz.: "to dissolve [206] the attachment and discharge the attached property." He renews the same motion made in the State courts, and offers to submit it either upon the affidavits taken therein or upon new or additional affidavits to be produced by the parties.

It is this motion which was argued to the court. The plaintiff contended that the court had no power to entertain it. The

defendant maintained that the court had the power, and, under the circumstances, ought to exercise it.

Mr. Wakely, for the Plaintiff.

Mr. Redick, for the Defendant.

DILLON, *Circuit Judge*.—This cause was removed by the *plaintiff* to this court under the Act of March 2, 1867 (14 U. S. Stats. 558), amendatory in terms to the Act of July 27, 1866 (14 U. S. Stats. 306). It was commenced in the State court by a writ of attachment issued pursuant to the statutes of the State and by rule adopted in this court. Prior to the transfer the defendant had moved to have the attachment dissolved or property attached discharged; upon this motion both parties took all the testimony they deemed essential, and submitted the question to the decision of the State court. This question was one of fact, viz.: whether the defendant was guilty of the fraudulent act or purpose charged against him as the ground for the attachment. The court denied the motion, and subsequently the cause was transferred to this court, where the same motion was renewed, or a new motion of a similar character made, which the defendant offers to submit, either upon the former affidavits, or upon new, or upon additional affidavits, as the plaintiff may elect, or the court may order.

The first question made by counsel is whether this court, after a cause is removed to it, has the *power* in any case to entertain such a motion. If so, the next question made is whether, under the circumstances, it ought to exercise it in this case.

[307] That the court has the power to entertain such a motion does not, it seems to me, admit of reasonable doubt, it being conceded that such a motion may be rightfully made in the State court, under the State practice, which by adoption is also the practice of this court. By the express provision of the act of Congress, the cause is to proceed *in the same manner* as if it had been originally brought here; the attachment is to hold “in the *same manner* as by the laws of the State it would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced.” And the power of the circuit court to “set aside or dissolve” an attachment,

injunction, or other restraining process is recognized, and the right of the opposite party to indemnity obligations filed in the State courts expressly declared.

The intention of these provisions manifestly is to put this court, in administering such remedies, in the place of the State court and clothe it with its powers. Conceding that such a motion is authorized by the State law and practice, there can be but little doubt, under the above-mentioned acts of Congress and the rules of the court adopting the State statutes relating to attachments and to practice, that if no such motion had ever been made in the State court, and could have been made there had the cause remained, it could equally be made here upon its removal. Hence the right to make, and the power to hear, such a motion may exist after the cause has been transferred.

Assuming the power to exist, ought it in this case to be exercised? This is a matter which rests in the sound discretion of the court, under the special circumstances of the particular case. A decision on a motion in a pending suit is not *res judicata* so as to conclude the parties and the court from again re-opening the matter, in a subsequent stage of the cause.

As the parties were fully heard upon the merits of the motion in the State court, certainly there ought to be some good reason why this court should listen favorably to an application ^[208] for a new hearing. I should myself in such a case feel a strong disinclination to sit in review upon the decision of the State court, when it was proposed to submit the matter upon the same evidence and no other.

Considering the special circumstances of this case, among which is one that the *plaintiff* removed the action after it stood for trial in the State court, thus causing delay, and is now asking for a continuance; that he has a large amount of property attached, to the great inconvenience and probable damage of the defendant, who is ready for trial, the court will make this order on the pending motion, to wit: If the plaintiff is ready for trial at this term, the defendant's motion to discharge the attached property will be denied; otherwise it will be entertained, and both parties will be at liberty to produce additional affidavits, and be heard *de novo* upon the merits of the motion.

DUNDY, J., concurs.

Ordered accordingly.

[NOTE.—That suit commenced by attachment may be removed and attachment remain in force. See *Barney v. Globe Bank*, 5 Blatchf. 107; S. C. 2 Am. Law Reg. (N. S.) 221; *Clarke v. Chase*, 11 Law Rep. (N. S.) 394; *McLeod v. Duncan*, 5 McLean, 342.]

Federal Court, on Removal of Cause from State court, may entertain motion to dissolve attachment under State law.—Cited, *Claffin v. Steinberg*, 2 Dill. 326. Distinguished, *Bates v. Days*, 11 Fed. Rep. 530.

BEECHER & TONCRAY v. GILLETT & KING.

REMOVAL OF CAUSE BY NON-RESIDENT CREDITORS.—In an action of replevin commenced in the State court by a resident citizen against a sheriff who has seized goods at the instance of non-resident creditors, the latter under a statute of the State by order of the State court, were substituted as defendants "in lieu" of the sheriff who was discharged from liability. *Held*, that being thus made sole defendants, the non-resident creditors were entitled, on filing the requisite petition, to have the cause removed to the proper federal court.

Before DILLON, J., and DUNDY, J.

ON motion to remand the cause to the State court. This is an action of replevin, commenced originally in one of the [200] State courts. The plaintiffs in the action are Beecher & Toncray. The defendant in the petition in replevin was one A. J. Arnold, sheriff of Platte County. The goods sought were taken on the writ of replevin by the coroner and delivered to the plaintiffs. The sheriff filed an answer in the State court, and claimed therein to hold the property by virtue of a writ of attachment directed to him in a suit in one of the State courts, wherein Gillett & King were plaintiffs and Dale & Co. were defendants, and that he seized and held the property as the property of Dale & Co.

Under provisions of a statute of the State of Nebraska, the sheriff subsequently filed his affidavit stating, in substance, that he had no interest in the suit except as an officer; that the real parties in interest were Gillett & King, and he asked the court "to substitute them in his stead as parties defendant to the action."

The court, after argument, granted the application, and entered an order that the said Gillett & King "be, and they are hereby, made parties defendants in this action in lieu and in the stead of A. J. Arnold, sheriff, etc., and the said Arnold is hereby *discharged from all liability* to the parties to this action, in respect to the subject-matter thereof."

When the order of substitution was made, Gillett & King filed their petition in the State court for the removal of the cause into the circuit court of the United States. The petition for removal describes the nature of the replevin action, and states that the petitioners are the real defendants; that the amount in controversy exceeds five hundred dollars; that the petitioners, Gillett & King, are citizens of the State of Illinois; that from prejudice and local influence they will not be able to obtain justice in the State court, and offers the requisite security for entering copies, etc., in the circuit court.

The State court ordered the cause to be removed; and in this court the plaintiffs now move that the same be remanded to the State court.

Woolworth & Doane, for the Motion.

Redick & Howe, opposed.

[310] DILLON, *Circuit Judge*.—The State court construed the statute of the State to authorize the substitution of the creditors as parties in the place of the sheriff, and if that ruling were before us for review, we are not prepared to hold that it was erroneous. (Stats. of Neb. 1867, p. 400, §§ 48, 49.) The substitution of the parties for whom the sheriff acts "in lieu" of the sheriff, in an action brought against him for the recovery of personal property taken under execution, or for the proceeds of such property, is expressly provided for; and the extension of the right, by construction, to property taken under attachment is not unreasonable, and was regarded by the State court as within the true meaning and purpose of the enactment.

Such legislation is not unusual. (Rev. of Iowa, 1860, § 2768; *Gunn v. Gudehus*, 15 Mon. B. 449.)

Gillett & King were made defendants *in lieu of the sheriff, who was discharged* from all liability to the present plaintiffs.

Upon this order being made, Gillett & King, who were citizens of another State, filed their petition in due form for the removal of the cause. They were non-resident creditors of Dale & Co., resident debtors. The latter made a sale of their property to the present plaintiffs, also residents of Nebraska. The validity of this sale Gillett & King attacked by their attachment levy.

The adversary parties to the controversy are Gillett & King, of Illinois, on the one side, and the present plaintiffs of Nebraska on the other. By the order of the State court (which we must assume to be correct) Gillett & King were made the *sole* defendants on the record, and filed their petition for removal in due form, stating the existence of local influence and prejudice. This case is distinguishable from *Nye v. Nightingale*, 6 R. I. 439, 1860, decided under section 12 of the judiciary act, where the resident officer was held to be not only a party, but a necessary party.

In our judgment the court properly ordered the removal, and the motion to remand is denied.

DUNDY, J., concurs.

Motion overruled.

[311] JACKSON v. BURKE.

STATUTE OF LIMITATIONS — APPLICATION OF PAYMENTS. — Where not restricted the creditor has the right to apply payments so as to prevent the bar of the Statute of Limitations.

Before DILLON, J., and DUNDY, J.

ACTION brought is 1870, on *eleven* promissory notes, made in Illinois, by the defendant to plaintiff. These notes became due in 1857. Each of the notes contains an indorsement of a partial payment under the date of April 1, 1866, a date within five years of the time when the suit was commenced. Plea: Statute of Limitations.

The statute of Nebraska provides that actions on notes shall be barred in five years, but adds, that “*when any part of the prin-*

cipal or interest shall have been paid an action may be brought in such case within five years after such payment."

On the trial the evidence tended to show that the notes in suit were made for the same consideration, and at the same time.

In 1866, it appeared that the defendant went to Illinois, and left with the plaintiff, a resident of that State, a draft on St. Louis for four hundred and seventy-five dollars; with directions to pay two hundred and forty dollars to two other persons, and *to apply the balance on the debt or notes due the plaintiff*. The plaintiff paid those two persons as directed, and then indorsed the balance in equal amounts upon the eleven notes in suit, and these are the indorsements now appearing thereon.

The defendant then lived in a different State from the plaintiff, and there was no evidence that the indorsements he thus made were communicated to the defendant. At the time of such payment all the notes were due and drew interest alike, and none were barred by the laws of Illinois.

On these facts, the plaintiff contended that he was authorized to make the application of the payment to *all* the different [312] notes; while the defendant maintained that it was the duty of the plaintiff, or of the court, to make the application so as to pay as far as it would do so, certain notes in full (which would fully pay two of them), and leave the others wholly unpaid, and therefore barred.

Baldwin & O'Brien, for the Plaintiff.

Mr. Redick, for the Defendant.

DILLON, *Circuit Judge*.—The notes in suit are not barred. The evidence tends to show that the defendant, the debtor, expressly directed the payment to be applied and indorsed on all the notes equally, without discrimination. But if this was not his direction, there was no restriction shown on the creditor's right to make the application, and under the circumstances and in the absence of such restriction, the creditor had the right to make the application in the manner he did, namely, equally to all the notes, and thus protect all from the bar of the statute.

DUNDY, J., concurs.

Judgment for plaintiff.

SERROT v. OMAHA CITY.

MUNICIPAL CORPORATION—LIABILITY FOR DEFECTIVE STREETS—NOTICE.—In an action against a city for an accident caused to the plaintiff by reason of a dangerous excavation in one of its public and frequented streets, the character of the excavation and of the street as described in the declaration, and the express allegation of carelessness on the part of the city in respect thereto, were held on demurrer to show a *prima facie* liability, without a distinct allegation that the city had notice of the defect in the street which caused the injury.

Before DILLON, J., and DUNDY, J.

[313] *Action for Damages.*—Demurrer to petition on the ground that the city is not liable in the absence of an averment that it had notice of the defect in the street which caused the injury, for which the plaintiff sues.

The petition, in addition to the usual averments, alleged that Farnam Street, where the accident happened, was one of "the principal business streets of the city, and one of the most traveled of any of the streets." . . . "That on *and before* the 28th day of July, 1869 [the date of the accident, which happened at night], there was, and had been for some time, on the said Farnam Street, a cut, or hole, or excavation, of the length of twenty feet, of the width of twelve feet, and of the depth of ten feet; which said hole or excavation was wrongfully and unjustly permitted to be and continue open, without notice or protection to the public, and that it was so left open through the *carelessness and negligence of the said city*," etc., whereby the plaintiff was injured, etc.

Mr. Elliott, for the Plaintiff.

Bartlett & Doane, for the Defendant.

DILLON, *Circuit Judge.*—The petition is sufficient, as against the objection urged on the demurrer. The ground of the action is the negligence of the city. Considering the nature of the street, the character of the excavation, which could not be suddenly made, and the express allegation of carelessness, the petition alleges facts showing a *prima facie* liability on the part of the defendant. In what cases, in an action of this kind, knowl-

edge by the defendant of the defect is essential to liability therefor, we need not discuss.

DUNDY, J., concurs.

Demurrer overruled.

[814] [NOTE. — As to necessity of notice to city, or the lapse of sufficient time to acquire knowledge, of the unsafe condition of the street, see *Ward v. Jefferson*, 24 Wis. 842; *Griffin v. New York*, 9 N. Y. 456; *Requa v. Rochester*, N. Y. Court of Appeals, March, 1871; *Hubbard v. Concord*, 85 N. H. 52, 74; *Reed v. Northfield*, 13 Pick. 94; *Worster v. Canal Bridge*, 16 Pick. 541; *Hart v. Brooklyn*, 36 Barb. 226; *Weightman v. Washington*, 1 Black, 39, 62, per Clifford, J.; *McGinity v. Mayor*, 5 Duer, 674; *Manchester v. Hartford*, 30 Conn. 118; *Howe v. Lowell*, 101 Mass. 99. The house of Lords, upon great consideration, have recently held that having the means of knowledge, and negligently remaining ignorant, is equivalent in creating a liability to actual knowledge. (*Mersey Docks v. Gibbs*, 11 H. L. Cas. 687, 701; S. C. Law Rep. 1 H. L. 93, 1866.)

Where notice is necessary, it may be inferred from notoriety and long continuance of the defect (*Reed v. Northfield*, *supra*); but should be averred (*Worster v. Canal Co. supra*); neglect actionable, though not wilful. *Erie v. Schwingle*, 22 Pa. St. 384; see *West Chester v. Apple*, 35 Pa. St. 284; *Ware v. St. Paul Water Co. post.*]

UNION PACIFIC RAILROAD CO. v. LINCOLN COUNTY.

TAXATION — POWER OF THE STATES — EXEMPTION OF RAILROADS. — The interest of the general government in the Union Pacific Railroad Company, though chartered and aided by Congress, is not such as to exempt the company and its property from taxation by a State, through which the road is located and operated.

ID. — EXEMPTION OF FEDERAL INSTRUMENTALITIES. — The doctrine of the implied exemption of federal instrumentalities from State taxation, considered and applied to this corporation, and the result reached, that it is not such an instrumentality; and if, in any case, it is such, the paramount rights of the government would not be affected, and, under the acts of Congress, could not be injured by any subordinate right of the State to tax and sell the property of the corporation.

POWER OF STATES — TAXATION OF RAILROADS. — Under the legislation of Nebraska, the county of Lincoln has the right to tax railroads in the unorganized country attached to it for revenue purposes.

Before DILLON, J., and DUNDY, J.

On motion to continue the temporary injunction, heretofore allowed. — The bill in this suit is filed to restrain the defendant, [815] who is the county treasurer of Lincoln County, in the

State of Nebraska, from proceeding to collect taxes upon the property of the complainant, assessed and levied under the revenue law of the State. (Act of 1869, p. 179.) Section 17 of this act provides for the assessment and taxation of the property of canal, turnpike, *railway*, and other corporations, and makes it the duty of certain officers of these corporations to list, under oath, "all their personal property, which shall be held to include road-bed, depots, water stations, . . . and such other realty as is necessary for the daily business operations of said road, etc.

"Returns are to be made to the auditor of State, on or before the first Monday of March, annually, of the amount of such property situated in *each organized* county," etc.

Taxes thus assessed are collected by sale and distress of *personal property* (§ 49); are made a special lien on real property (§ 51), and real estate may be sold for delinquent taxes when the collector is not able to make the same by distress and sale of personal property. (§ 54.)

Under this act a list was furnished by the auditor of State to the officers of the complainant, and the general superintendent returned the company as having two hundred and forty-six miles of road in "London County and west of the State line," of the average value of \$16,000 per mile.

Upon this length of road, and upon this valuation, the county authorities of Lincoln County assessed the property of the company, the total valuation being (as alleged) \$3,936,000, and the amount of taxes charged for the year 1869 is \$45,264, for State, county, and school purposes; while for the same year, the said county, upon all *other* persons, corporations, and property, only levied taxes to the amount, in the aggregate, of \$6,350.

The pleadings show that the county of Lincoln is the most westerly *organized* county in the State, through which the road of the complainant runs; that immediately west of Lincoln County is a large tract of unorganized territory, west of which, and extending to the west line of the State, is the unorganized [§16] county of Cheyenne. The road runs through this unorganized territory, as well as through Cheyenne County.

By the averments of the bill, supported by affidavits, it would appear that the length of complainant's road through Lincoln

County, to the west line of the State, instead of being two hundred and forty-six miles, is only about one hundred and sixty-six miles, of which *but eight miles are in Lincoln County* (the road crossing only a corner of the county), and the residue of the one hundred and seventy-six miles is in Cheyenne County (one hundred and five miles), and in the unorganized territory between that and Lincoln County (sixty-three miles).

The bill seeks to restrain the collection of the tax, for the three following reasons:—

1. Because two hundred and forty-six miles of road-bed have been assessed by the authorities of Lincoln County; whereas only one hundred and seventy-six miles of the road-bed are situate in Lincoln County and the attached territory west of it, to the State line.

2. Because Lincoln County is not, *by law*, authorized to tax any portion of the road-bed or property of the defendant, except such as is situate within its geographical limits.

3. Because the State of Nebraska has no power to subject to taxation, for State purposes, the road-bed, rolling stock, and other property necessary for the use and operation of the complainant's road; such power resting, as it is claimed, exclusively in the government of the United States.

On the 15th day of February, 1869, the legislature of Nebraska passed an act "to define the western boundary of Lincoln County"; and, after defining it, the act makes this important provision, to wit: *That all the unorganized country lying west of the western boundary of Lincoln, and east of the east line of Cheyenne County, and south of the North Platte River, be and the same is hereby attached to the said county of Lincoln for judicial and revenue purposes, and* ^[317] *that the county of Cheyenne be and the same is hereby attached, for judicial and revenue purposes, to said county of Lincoln.*" (Laws of Neb. 1869, p. 249.)

This act, as well as the revenue act, before mentioned, was approved on the 15th day of February, 1869, and each went into effect from its passage.

The more material provisions of the acts of Congress relating to the Union Pacific Railroad Company may be here conveniently mentioned.

The company was incorporated by Act of Congress of July

1, 1862 (12 U. S. Stats. 489). This act was subsequently amended in some essential particulars, especially by the Act of July 2, 1864 (13 U. S. Stats. 386).

The incorporating statute is entitled, "an act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure the government the use of the same for postal, military, and other purposes."

By this act Congress incorporated certain individuals, their associates and successors, as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada Territory.

It fixed the amount of the capital stock and shares, and declared that "*the stockholders should constitute said body politic and corporate.*" The government has no stock in the road, though it has five directors, not stockholders, against fifteen company directors.

The act grants the company the right of way through the public lands; and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," makes it an extensive grant of lands, and provides for the issuing of patents therefor.

And for the *same purposes* the United States agreed to, [§18] and did issue, its thirty-year six per cent bonds to the company, to the amount of \$16,000 per mile, for each section of forty miles; which bonds, the original act declared, "shall, *ipso facto*, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind," and made specific provision as to proceedings, on the failure of the company, to redeem the bonds.

By the Act of July 2, 1864, this was changed, and the company authorized to issue its "*first mortgage bonds*, to an amount not exceeding the bonds of the United States," and *the lien* of the United States bonds was declared to be *subordinate* to the bonds so issued by the company, with the exception relating to the transportation of dispatches, troops, mails, etc., for the government.

These grants to the company are declared to be "*made upon*

condition, (1) that the company shall pay the bonds of the United States at maturity; (2) shall keep their line and road in repair and use; (3) transport mails, troops, etc., giving the government the preference, at fair and reasonable rates of compensation, the amount thus earned to be applied in payment of the bonds, as well as five per cent of the net earnings of the road after its completion." By the seventeenth section of the act it is provided if the road, when finished, is for any unreasonable time permitted to remain out of repair, or unfit for use, Congress is authorized to put the same in repair and use, and reimburse the government for expenditures thus caused from the income of the road.

The eighteenth section provides that when the net earnings of the road exceed ten per cent of its cost, Congress may reduce, fix, and regulate rates of fare thereon, and declares that "the better to accomplish the object of this act, to wit, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government, at all times (but particularly in times of war), the use and benefits ^(§10) of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, *add to, alter, amend, or repeal this act.*"

The act also contains provisions that, as far as the public and government are concerned, the said railroad and branches shall be operated as one connected and continuous line.

There is *no provision* in any act of Congress relating to this company *respecting the taxation* of it, or its property, by the States through which its road may run.

At the date of the passage of the act incorporating the company, Nebraska was in a territorial condition under the Act of 1854, organizing the territories of Nebraska and Kansas.

In 1867, Nebraska was admitted into the Union "upon an equal footing with the original States, in all respects whatever."

By the enabling Act of Congress of April 10, 1864, Nebraska was required to, and subsequently did, in her Constitution, disable herself from taxing "lands or property therein belonging to, or which may hereafter be purchased by, the United States";

and accordingly her revenue laws, in terms, exempt from taxation the property of the United States.

The case is now before the court on a motion by the complainant, that the injunction allowed by the district judge be continued until the final hearing.

A. J. Poppleton, and *E. Wakely*, for the Complainant.

J. M. Woolworth, for the Defendant.

DILLON, *Circuit Judge*. — 1. The authorities of the State of Nebraska have assessed and levied, for the year 1869. taxes upon the property of the Union Pacific Railroad Company situate therein. The company brings the present bill, in this court, to restrain the collection of these taxes. No question is made concerning jurisdiction. The cause is before the court [330] on the motion of the company to continue in force the injunction allowed in vacation, and has been ably argued by counsel, on the merits of the application.

One of the grounds for the injunction is fundamental in its nature, and if well taken is decisive, not only of the present case, but against the power of the State, in any event, to subject the property of the company to taxation by its authority. To this ground, therefore, we shall first direct our attention. It is that the State of Nebraska has no power to levy a tax upon any property of the Union Pacific Railroad Company which is appurtenant to, or necessary for, the use and operation of its road. The argument in support of this proposition is, that the corporation was created by Congress, and not by the State; that it was created because deemed, by Congress a fit instrumentality or means of exercising the constitutional power of carrying on, promoting or facilitating the operations, or executing the duties of the general government, and that if it be such instrumentality or means, it is settled that it is beyond the taxing power of the State.

Reliance is placed upon the cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborn v. The Bank of the United States*, 9 Wheat. 738, in which it was held by the supreme court that this bank, "as the great instrument by which the fiscal operations of the government were effected," and "as a public corpora-

tion, created for public and national purposes," was not, on its capital or in its operations, taxable by the States. In a word, it is claimed by the company that as respects **immunity** from taxation, it stands precisely in the **situation** of the bank, and that taxation of it by the States is unconstitutional, for the same reasons that in those cases the laws of Maryland and Ohio taxing the bank, were adjudged to be invalid.

The defendant controverts these propositions, and contends that the Union Pacific Railroad Company, though chartered by Congress, is essentially a "private corporation, whose principal object is individual trade and individual profit, ^[231] and not a public corporation, created for public and national purposes"; and denies that it is an instrument, agency, or means of the general government, in such a sense as, on this ground, to exempt it by necessary implication from taxation by the States. The cases referred to undoubtedly establish the doctrine that no State has the right to tax the means, agencies, or instrumentalities rightfully employed within the States by the general government for the execution of its powers; and this doctrine is adhered to, and, when understood with the necessary qualifications, declared to be sound by the supreme court in its latest adjudications on the subject. (*Thompson v. Pacific Railroad*, 9 Wall. 579, 591; *National Bank v. Commonwealth*, 9 Wall. 353, 361.)

The doctrine of the implied exemption of federal instrumentalities from State taxation, its *rationale*, and its limitations, are so clearly stated by the learned justice assigned to this circuit, in the case last cited, that his observations may be advantageously extracted to aid our present inquiries. The case related to the right of the States to tax shares of the national banks, and "it is argued," says Mr. Justice Miller, "that the banks, being instrumentalities of the federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by this court. But the doctrine has its foundation in the proposition that the right of taxation may be

so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. . . . The principle we are discussing has its limitation—a limitation growing out of the necessity on which ^[see] the principle itself is founded. The limitation is that the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing, the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.” (9 Wall. 361, 362.) The State legislation, then, to come within the operation of the principle, must relate not simply to an agent, but to an *agency* of the general government, and must be of a character which incapacitates the agency to perform, or interferes with its efficiency in performing its duties to the government, or it must (as in the case of a tax, which if valid at all, is valid to any extent the State may see fit to press it), assert a principle in its nature antagonistic to the federal instrumentality, and which may be exercised to destroy it.

Having thus defined and limited the principle on which the company relies as exempting it from the right of the State to tax its property, the next step in the inquiry is to determine whether this corporation is a federal instrumentality, within the meaning of the rule, and one which might be destroyed by the State if it was permitted to tax it.

Upon the most careful examination of the acts of Congress relating to this company, and upon the best reflection I have been able to give the subject, I am of opinion that the interest of the government in the corporation, though organized under Congressional authority, is not such as will bring it within the principle of *implied* exemption from the taxing power of the

State. That there is, in any act of Congress, an express provision on the subject of taxation, or a prohibition to the State to tax the company, is not claimed.

[323] The Union Pacific Railroad Company is a private corporation, in the sense that all of its capital stock is owned by the stockholders, and these constitute the corporate body. The government has no stock in the road. But, in another sense, the corporation is a public one as respects the government, and the relations it sustains to the government are very peculiar. The government created the corporation, and both authorized and aided the building of the road. It was to be constructed within the territories of the United States; and if Congress was not the only power which could erect said corporation, and authorize it to build the road therein, it is certain that no road could have been constructed through the national domain against the will of Congress.

The purpose of Congress is manifest, not only from the nature of the legislative provisions, but from the plain expression of it, both in the title and in the body of the incorporating act. It is declared in the 18th section that "the object of this act is to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes," and to this end "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." And to the same effect is the title, which is, "an act to *aid in the construction of a railroad, etc., and to secure to the government the use of the same for postal, military, and other purposes.*"

The government aided the corporation by giving it the right of way, by granting it lands, and by issuing to it bonds which were originally the first, but, by the consent of Congress, subsequently became the second mortgage or lien on the road. Now, the act shows (§§ 6, 17, 18), that the grants of corporate existence, of the right of way, of lands, and of pecuniary aid, were all made upon the condition or consideration that the corporation should build the road and [324] keep it in repair and operation, so that the government might at all times have the use

and benefit of the same for postal, military, or other purposes. To prevent this object from being defeated, Congress reserved the right to repair and run the road (§ 17), and at all times to legislate generally with respect to the rights of the company (§ 18). The ownership of the road and its property is in the corporation. Its bonds, by the consent of Congress, have been made a first mortgage; and the government bonds are the second mortgage "on the whole line of railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description." (See § 5, Act of July 1, 1862, and § 10, Act of July 2, 1864.) If these first mortgage bonds are not paid, is it not clear that they may be foreclosed, and "the whole line of the road and all its property" be sold to the purchaser, who would thereby, as against the corporation and against the United States, acquire the title unless the United States redeemed the debt? Such purchaser would acquire the ownership of the road and its property, but he would not acquire these discharged of the duty of the corporation to keep the road in repair, and to run it as a continuous line in connection with the other roads, and to transport the mails, troops, stores, etc., of the government; nor would the sale under the mortgage divest the government of its reserved right of legislative control in order to secure to the government the purposes for which it created the corporation, and so bountifully aided it to execute its great undertaking.

So far as the government sustains to this road the mere relation of creditor or lien holder, such a sale, it may be true, would defeat or foreclose its rights as such a creditor or lienor, the same as in ordinary cases a second mortgage is cut off by a foreclosure and sale under the first. But so far as the government sustains political, public, or sovereign relations to the road, these remain, after such a sale, the same as before. The sale does not annihilate the corporation as a legal personality, nor, in my opinion, was it destroyed, or the legislative ^[325] control of Congress over it abridged, by the subsequent admission of Nebraska into the Union as a State.

Congress gave the corporation, in terms, the power to make contracts, which includes the power to incur indebtedness, for which it was declared liable to be sued. It cannot be main-

tained, I suppose, that the corporation, having become indebted, would not be authorized, the same as other corporations, to appropriate its property to pay its debts; or, that being sued, and judgment passing against it, its property could not be reached, and, if necessary, sold or otherwise judicially appropriated to the satisfaction of the judgment. If thus sold, the purchaser, as in the case of the sale under mortgage, would take a title subject to all the conditions of the constituent statute of the corporation, and all the duties and liabilities of the corporation to the United States, not of a nature to be destroyed by the sale or transfer.

Judge Shepley has recently decided that the words of the bankrupt act, "all moneyed, business, or commercial corporations," include railroad corporations, which are consequently liable to be adjudicated bankrupts thereunder. (*Adams v. The Boston, Hartford, etc., Railroad Co.* 5 Am. Law Rev. (January, 1871), 375.) He also held, following *Hall v. Sullivan Railroad Company, infra*, that under the bankrupt act certain franchises, but not the franchise to be a corporation, were alienable in their nature, and were subject to sale and to transfer at the instance of creditors; but "the purchaser," he says, "must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the State," etc. If this view of the bankrupt law is correct, I see no reason why the act would not include the Pacific Railroad Corporation as well as others. The franchise to be a corporation is one thing, and the franchise of carrying on its business and taking tolls is another. The one cannot be aliened without a clear provision of law to that effect, while the other franchises are alienable in their nature. This distinction is plainly drawn by Mr. Justice Curtis in his ^[see] elaborate opinion in *Hall v. Sullivan Railroad Company*, first published in *Pierce on Railroads* (p. 520, note), and since reported, 21 Law Rep. 138. This eminent jurist says: "The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchise to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing

in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The purpose of these illustrations, and their bearing on the question under consideration, are manifest. In its nature a tax is a debt or liability, though of a peculiar character, and whose enforcement, for reasons of expediency, is usually provided for by a summary sale of property, though it might in all cases, and sometimes is directed, or allowed to be enforced by an ordinary action.

Congress had the power to create this corporation; it had the power to make its grants conditioned upon the performance by the corporation of certain duties; the power to reserve legislative control over it, as it did, and these and other provisions of the act intended to secure to the government the use of the road for postal, military, and other public purposes, are not abrogated or abridged by the subsequent admission of Nebraska into the Union as a State, and these rights are inalienable in their nature without the consent of Congress, and not destructible by any act of the company. The property of the company and the right to operate the road may be sold or transferred under the mortgage or otherwise, or, it may be, under a sale for taxes; but the purchaser in either case will take his rights, subject to the fundamental conditions on which the corporation exists, and subject to its public duties and liabilities to the government. The State cannot tax this corporation out of existence. It cannot sell or destroy its franchise (derived from Congress) to be a corporation. ⁽²²⁷⁾ The public duties which it owes to the government it will owe into whosoever hands its other, subordinate and assignable franchises or property may pass. So far as the rights of the government are those of a mere creditor, it may be true that it would be affected by a sale, the same as any other creditor with like rights, but this is an inquiry into which it is not necessary now to enter.

I conclude this discussion by stating that it results from the foregoing views:—

First. That the Union Pacific Railroad Company is not an instrument of the government in such a sense as exempts it, by implication, from the taxing power of the State through which its road may be located.

Second. If it be in any sense a federal instrumentality, the rights of the government, under the incorporating act, are fully protected and reserved, and any rights derived from a sale for taxes, under State authority, are entirely subordinate to the original, paramount, and indefeasible rights of the general government; cannot destroy the corporation nor incapacitate it from discharging any of its inalienable, fundamental, and organic duties to the government. If so, then the case falls without the principle on which the corporation relies to sustain its application for an injunction.

I think I can discover, in the more recent judgments of the supreme court, evidences of a conviction on the part of the judges that the doctrine of implied exemption of federal agencies from *State taxation* has been carried quite to its limit, and that it will not be pressed to embrace a case of the character of the one now under consideration.

2. It is next claimed by the company that there is no authority in Lincoln County to tax any portion of the road situate beyond its limits. But in my judgment the act of the 15th day of February, 1869 (Laws Neb. 1869, p. 249), is sufficient to authorize the action of the county in taxing the road-bed situate west of it. This act, in terms, attaches the county of Cheyenne and the unorganized territory to Lincoln ^[228] County *for judicial and revenue purposes*, and is to be construed in connection with the revenue act, enacted at the same time. Thus, to the word "county," as occurring in the general revenue act (§ 17) is to be annexed by construction as respects the county of Lincoln, the words "and attached territory." The same language which annexes it for revenue purposes is that adopted in this and other acts of the State for annexing unorganized territory to organized counties for *judicial* purposes. It has always been regarded as sufficient for the latter purpose, and, if so, it is equally so for the former, and great mischief would undoubtedly flow from any new view on this subject.

3. The only remaining ground for the injunction is, that conceding the road is taxable, and that the county of Lincoln has authority to tax all the road west of it to the State line, there are, in fact, only one hundred and seventy-six miles of road, while the county has assessed and is seeking to collect a

tax upon two hundred and forty-six miles — seventy miles more than have any existence. The difference in the tax is over twelve thousand dollars, and if the company is right that these seventy miles have no existence, it would strike the mind as unconscionable for the authorities of the State to insist upon availing themselves of the mistake by which this amount was erroneously assessed. But whether equity can relieve I prefer to determine when the precise facts are ascertained; and meantime as to this, I will order the injunction to be continued in force; but in other respects it will stand dissolved.

DUNDY, J., concurs.

Ordered accordingly.

Note. Railroad Companies are not Exempt from Taxation by reason of the government owning interests in the companies. — Cited, *Sweatt v. Boston & H. R. R. Co.* 5 Bank. Reg. 250, 251.

Judgment affirmed on appeal, 18 Wall. 5.

[329] HOSTETTER ET AL. v. VOWINKLE ET AL.

TRADE-MARKS — PROTECTION BY INJUNCTION. — Equity will protect, by injunction, the rights of one who has adopted and appropriated a *trade-mark* to distinguish his goods; and if his rights are invaded, the originator or proprietor of the trade-mark may also recover his damages (ordinarily the loss of profits) from the wrong-doer.

UNLAWFUL IMITATION OF TRADE-MARK, WHAT IS. — The imitation of the trade-mark of another to be unlawful need not be in all particulars exact and complete; it is sufficient if it be of a nature to mislead and deceive; accordingly, an imitation of a manufacturer's label in every respect like the original, except that "Hostetter" was altered to "Holsteter," and the words "Hostetter & Smith," were changed to "Holsteter & Smyte," was held to be illegal, and ground for an injunction and for damages.

TRADE-MARKS — ILLEGAL IMITATIONS — DAMAGES. — There being proof that the plaintiffs had an established trade in the city where the imitated bitters were made and sold by the defendants, and that their sales fell off, in that place, in an amount at least equal to sales made by the defendants of the imitated article, the court gave the plaintiffs as damages the profits they would have made on the number of bottles which the defendants actually sold of their own manufacture, being satisfied that the plaintiffs' sales had been reduced to that extent by this cause.

Before DILLON, J., and DUNDY, J.

BILL in equity for an injunction and relief. The plaintiffs, David Hostetter and George W. Smith, are the proprietors and manufacturers of "Hostetter's Celebrated Stomach Bitters," at Pittsburg, Pennsylvania, and the defendants, three in number, are residents of Omaha, in Nebraska. The bill charges an infringement of the plaintiffs' trade-mark, invented and adopted to distinguish these bitters, and asks for an injunction and for damages.

The bill avers that the defendants, in Omaha, adopted and used for a time, bottles, labels, devices, and boxes in exact imitation of the plaintiffs', and after that made a slight alteration in the labels, but leaving them substantial copies of the plaintiffs', and calculated to deceive the public. The district judge allowed a temporary injunction. The answers, though not denying all the statements of the bill, do so sufficiently [see] to put the plaintiffs upon proof of the case made. The case was submitted upon the pleading, exhibits, and proofs. No defense was made on the ground that the article in question was not such as the law would protect.

Kennedy & Townsend, for the Complainants.

John I. Redick, for the Defendants.

DILLON, *Circuit Judge*.—The proofs show that as far back as 1853, Dr. Jacob Hostetter and the complainants (one of whom is his son), commenced the manufacture in Pittsburg, of what is known as Hostetter's stomach bitters, and that the business of making and vending these bitters has been carried on by them, and by the complainants, as their successors ever since. These bitters are made after a *recipe* of Dr. Jacob Hostetter. The annual sales have increased from thirty thousand dollars at first, until they reached, in 1869, the sum of over one million of dollars. These bitters are extensively advertised by the plaintiffs in nine different languages in the newspapers of this country and by circulars, labels, and otherwise. It is testified that the plaintiffs employ in publishing almanacs, etc., to advertise this article, twelve steam presses and several hand presses at an annual expenditure of ever three thousand dollars. In 1858, Doctor Jacob Hostetter retired from the business, leaving it to be con-

ducted by the present plaintiffs, David Hostetter and George W. Smith, and assigning for a valuable consideration his interest in the firm and in the right to use the *recipe* to his said son. Since then the plaintiffs have continued the manufacture and sale of the article in question. The proofs show beyond dispute, that for years the plaintiffs have used a certain trade-mark, consisting of the designation on the bottles and on the labels of "Hostetter's Celebrated Stomach Bitters," in connection with directions on the label for the use thereof, and a device representing the conflict of St. George and the Dragon, and the likeness of Dr. Hostetter, and *fac simile* signature of the firm of Hostetter & Smith.

[331] It is established by the testimony that from August 10, 1869, until October 1st, of the same year, the defendants adopted and used, in the sale of bitters of their own manufacture, the plaintiffs' trade-marks, labels, and devices in every respect. After that and down to the filing of the bill in the cause, the defendants slightly altered the trade-mark in certain particulars. "Hostetter" was altered to "Holsteter" and the *fac simile* signature of the plaintiff was changed from "Hostetter & Smith" to "Holsteter & Smyte," and the place of manufacture was stated as Pittsburg instead of New York. But the size of the labels and the devices, the appearance, the directions for the use, the size and shape of the bottles, mode of packing, etc., were in exact imitation of the plaintiffs, and the boxes or cases intended for sale were marked "Dr. Hostetter's Bitters," the same as the genuine.

The fact of infringement is too obvious to be disputed, and is not seriously controverted by the respondent's counsel. But he claims in the first place that the plaintiffs have no title to the trade-mark because they have not shown a regular assignment from Dr. Jacob Hostetter to them. And the precise point is that this assignment was in writing, and that a copy thereof is annexed to the deposition of the witness, and no reason is given for not producing the original.

Without stopping to inquire whether such an objection could be made available for the first time by way of argument after the cause is submitted, it is a sufficient answer to say that since the evidence is clear and undisputed that the present plaintiffs

have been in the exclusive use of this trade-mark since 1858, they are not obliged to show, as against wrong-doers, that they have a written assignment from one of their former partners.

The law is well settled that a party who has appropriated a particular trade-mark to distinguish his goods from other similar goods has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity [832] will protect it, by injunction, from invasion, and if it has been invaded the wrong-doer is liable for the damage he has thereby caused the party whose trade-mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. (*Candee et al. v. Deere et al.* Ill. Sup. Ct. 1871; *Motley & Downman*, 3 Mylne & C. 1; *Millington v. Fox*, 3 Mylne & C. 338; Eden on Injunc. ch. 14, p. 314; Story Eq. Jurisp. § 951; *Taylor v. Carpenter*, 2 Wood. & M. 1; *Walton v. Crowley*, 3 Blatchf. 440; *Coffeen v. Brunton*, 4 McLean, 518; *Seixo v. Provezende*, Law R. 1 Ch. 194; *Amoskeag Manuf. Co. v. Spear*, 2 Sand. S. C. R. 606; *Filley v. Fassett*, 8 Am. Law Reg. (N. S.) 402, and cases cited; *Gillott v. Esterbrook*, 47 Barb. 469; *Burnett v. Phalon*, 9 Bosw. 192; *Croft v. Day*, 7 Beav. 89; *Soleston v. Vick*, 23 Eng. C. L. & Eq. 53, 469; *Eddleson v. Vick*, 23 Eng. L. & Eq. 53.) These cases and others, also, show that it is not necessary to constitute an illegal infringement, that the trade-mark of the originator should be copied in every particular; it is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator, or make it pass with the public as his.

Applying these principles to the present case, the defendants are liable to the plaintiffs not only in respect to the bitters which they sold prior to October 1st, using the plaintiffs' trade-mark in full, but for those which they sold after making the alterations above mentioned, such as changing the name "Hostetter" to "Holsteter," etc.

From the evidence of one of the defendants, I find that he admits sales at least to the extent of two hundred dozen bottles.

The evidence shows that the sales of the plaintiffs, in Omaha, fell off during the time the defendants were manufacturing and selling their imitation bitters to even a greater amount than this.

I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen ^[238] bottles the sum of four dollars, which would make in all the sum of eight hundred dollars.

A decree will be entered for this amount, and also making perpetual the injunction heretofore allowed.

DUNDY, J., concurs.

Decree accordingly.

Note. Illegal Imitation of Trade Marks Restrainable by injunction. — Cited, *Godillot v. Harris*, 81 N. Y. 267.

MURPHY v. PAYNTER ET AL.

EQUITY — UNREASONABLE DELAY NOT FAVORED. — Equity views with disfavor, unreasonable and unexplained delay in the assertion of rights, especially where the rights depend on oral evidence and the situation and value of the property affected have, in the mean time, greatly changed.

ID. — DURESS — UNREASONABLE DELAY. — Accordingly, a bill to set aside a deed for duress, alleged to have been practiced twelve years before, was dismissed, the complainant being without sufficient excuse for the delay, and the defendant having made costly and permanent improvements upon the property, and the evidence as to the duress being conflicting and unsatisfactory.

Before DILLON, J., and DUNDY, J.

THE bill was filed on the 1st day of October, 1869, and sets forth that on the 17th day of July, 1857, the complainant entered, by virtue of pre-emption, under the Act of 1841, a tract of land in Sarpy County, Nebraska, and received a duplicate therefor, and that on the same day he was forced by one Jesse Lowe (husband of the defendant, Sophia Lowe), and by the defendant Paynter and others, by insolence and by threats of great bodily harm, to execute a deed therefor to Paynter and Sophia Lowe, on receiving, against his will and when under duress, the sum of one hundred dollars. It is alleged that the defendants were aided in their illegal proceedings against the complainant by members ^[234] of the "Omaha Land Claim Club"; that from fear of this organization the complainant left

the State, and was prevented from instituting legal proceedings to recover the land until after the death of Jesse Lowe, in 1868. The prayer is that the deed so made, on the 17th day of July, 1857, be set aside.

The answer admits the complainant's purchase of the land at the land office, but alleges it was with money furnished to him by Lowe and Paynter, for whose benefit it was purchased. It denies any coercion, or duress, or fear of bodily harm, but alleges that the deed was voluntarily made in pursuance of a previous understanding between the parties, and in consideration of one hundred dollars paid therefor at the time.

A large amount of testimony has been taken on either side. It is very conflicting, and many parts of it are incapable of being reconciled.

Baldwin & O'Brien, for the Complainant.

J. M. Woolworth, for the Respondent.

DILLON, *Circuit Judge*.—In the spring of 1857, the complainant came to Omaha, and soon afterwards hired himself as a laborer, by the month, to Jesse Lowe. There is evidence of plaintiff's admission that he was to have so much per month for his services, and was to pre-empt for Lowe a piece of land. Lowe and Paynter were relatives by marriage, were in business together, and each had pre-emptions in his own name, on other land than that now in question. Hence, neither Lowe nor Paynter could pre-empt this land in his own name. The evidence is very satisfactory that the land now in controversy had been built upon, plowed, and, to some extent, fenced by Paynter and Lowe and those whose claim thereto they had purchased, and that these improvements were made in 1856, and before July, 1857. Lowe, while the complainant was in his service, sent him ^[335] to this land a short time before July, 1857, and he continued in the service of Lowe down to the date of the entry.

The complainant testifies that this land was vacant when he went there, in May or June, 1857, that he plowed part of it, built a house on it, and bought the lumber therefor of Paynter. In all these particulars the weight of evidence and the circumstances are strongly against him.

On the 17th day of July he entered the land, Paynter being his witness to prove up the pre-emption. The complainant says he purchased this land with his own money, with gold which he brought to Nebraska with him. On the other hand, the defendants claim that the complainant paid for the land with money furnished by Lowe and Paynter.

The complainant testifies that he paid for it with his own money. On the other hand, Paynter testifies that he saw Lowe pay Murphy the money with which to make payment at the land office, and that the money belonged to him and Lowe together.

The witness, Carlisle, here corroborates Paynter. He testifies that on the day Murphy proved up his pre-emption and made the entry, he saw Lowe give him the money, in Omaha, with which to make the payment at the land office. The payment was made and the certificate received in the name of the complainant. On the afternoon of that day occurred the transaction, in the course of which the complainant made the deed of the land to the defendants, which he is now seeking to have set aside because made under duress. Respecting this transaction the conflict in the testimony is painful and perplexing to the last degree. The complainant's version is that on the same day on which he made the entry and received the certificate, he was passing the office of Lowe, in Omaha, when Lowe accosted him and demanded the duplicate and a deed, and that upon complainant's refusal, Lowe, aided by Paynter and others, members of the Land Claim Club, forced him into his office, or forcibly kept him there, stripped and searched him, maltreated him, and threatened ^(see) his life if he did not make the deed required of him; that they compelled him to receive one hundred dollars against his will, and that he received the money and made the deed only to save his life, or his person from great bodily injury.

I feel bound to say that I find some of the features of this version of the transaction not a little confirmed by other witnesses than the plaintiff. The defendant's theory of the transaction is this: that at the time in question the complainant was passing by the office of Lowe as he claims; that Lowe casually saw him and assumed, as a matter of course, that he would carry out the understanding, and make a deed for the land; that on

his refusal a dispute arose; that the only crowd that gathered around was that which a dispute and conflict on the street would naturally assemble; that the stand taken by the complainant was, not that he would not make a deed for the land at all, but that he would not do so until he was paid by Lowe his wages in full, and the sum of one hundred dollars for his services in connection with proving up the pre-emption.

The defendants claim that though the complainant at one time endeavored to get out of the office and was forcibly detained by Lowe and some others, yet that he was not put in bodily fear, but on the contrary dictated the terms on which he was willing to make the deed, namely, payment for his services as a laborer for Lowe, and the receipt of one hundred dollars in addition; and that these terms were accepted by Lowe and the deed drawn accordingly, and voluntarily executed by the complainant, and the money voluntarily received by him.

In this account of the transaction the witnesses, Paynter, Miller, Carlisle, and Woolworth each substantially agreed. Against it are the direct and positive statements of the complainant, in which, as to some particulars, though not in all, he is corroborated by the witnesses, Robertson, Knight, and Hanigan.

In this conflict of testimony, object circumstances must be ^[337] regarded by the court in determining the cause. One of the most important of these, and in my judgment the controlling one, is the long delay of the complainant to seek relief. The deed which he is asking to impeach was made by him July 17, 1857. This bill was not filed until October 1, 1869, more than twelve years after the execution of the deed. This delay is not satisfactorily explained. The explanation given is that he feared the club, and was thus prevented from bringing suit until after the death of Lowe in 1868. The club ceased as an organization with the year 1857, and ever since then, if not always, it has been perfectly safe for the plaintiff to seek redress in the courts. This delay tends strongly to confirm the defendant's theory of the case, because if that theory be correct, the delay is consonant with it, while it is inconsistent with the plaintiff's theory of it.

But aside from this consideration, as affecting the probabilities of the transaction occurring when the deed was made, there is

another which I confess has had much weight with me in reaching, after some hesitation, the conclusion that the bill must be dismissed. During the lapse of this long period, not only has the land itself greatly advanced in value, but it has been largely improved by the defendant, Paynter, who has constantly cultivated it, and for the past few years made it his home. These improvements are permanent in their nature, and consist of houses, barns, fences, ditches, fruit trees, and plantations of other trees, etc., and cost and are worth about the sum of ten thousand dollars, an amount much exceeding, it is probable, the value of the land itself.

If the plaintiff gets the land, he gets these improvements as well, to which he has of course no equity, since he is not obliged and cannot be decreed to make any compensation therefor, and since he laid by, without adequate cause, and saw the defendant make them upon the faith of his deed.

From the view I take of the cause, after twice carefully reading all the proofs, I think it quite probable that the plaintiff might have had a decree if he had made the same ^[see] case upon suit brought recently after the transaction. But where the delay is so protracted, the change in the situation of the property so great, and the conflict in the evidence so radical, engendering doubts so grave as to the real character of the circumstances under which the deed was made, and in view of the clear case which the law ever requires to be established in order to set aside the solemn deed of the party, I can see no course fairly open, but to order the bill to be dismissed.

DUNDY, J., concurs.

Decree accordingly.

RAILROAD COMPANY v. OTOE COUNTY.

COUNTY BONDS—HOW DECLARED ON.—Where a county by public statute has the power to issue negotiable bonds on certain conditions, and its bonds are issued and in the hands of *bona fide* holders, such a holder is not bound to allege in his declaration the election or other facts showing a compliance with the conditions on which the issue of the bonds is authorized.

Before DILLON, J., and DUNDY, J.

THE questions to be determined arise on a demurrer to the petition, which consists of one hundred and thirty-five counts, *each* of which is as follows:—

“That on the 1st day of January, 1870, at Nebraska City, in said county, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised twenty years from date to pay the bearer one thousand dollars at the Broadway Bank in the city of New York, with interest payable semi-annually at said bank, at the rate of eight per cent per annum, according to divers coupons thereto attached, which bond, in order to distinguish it from ^[339] others of like character, was marked No. —; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place aforementioned, made by said county, whereby it promised to pay to the bearer thereof forty dollars at said bank, on the 1st day of July, 1870, for the interest then and there to be due on said bond, which coupon is in words and figures as follows:—

“\$40.

NEBRASKA CITY, January 1, 1870.

“The county of Otoe, in the State of Nebraska, promises to pay to the bearer forty dollars, at Broadway Bank, New York, on the 1st day of July, 1870, being for six months interest on bond No. —.

“A. STOUT,

“President Board County Commissioners.

“GEORGE R. McCALLUM, Clerk.

“That before said coupon by its terms became due and payable, the said bond, together with said coupon, came to and for value became the property of this plaintiff, who thereupon became, and has ever since been and still is the true and lawful holder thereof; that when said coupon by its terms became due and payable, the same was duly presented at the place of payment therein mentioned, and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often and in a friendly manner, applied to said defendant, at its treasury, in Nebraska City, in said county, to pay said coupon, but it has

refused to do so, notwithstanding it is justly indebted thereon to this plaintiff in the full sum of forty dollars, with interest from the first day of July, 1870."

The defendant assigns its causes of demurrer as follows:—

"1. The petition does not state any facts which would authorize the said defendant, by its county commissioners, to issue or deliver to any person or corporation, the bond referred to in said petition, or the coupons mentioned and set forth therein, upon which this action is ^[340] brought; nor does said petition show any authority or power in the county commissioners of Otoe County to make, issue, or deliver bonds and coupons of the defendant in any manner whatever.

"2. It does not appear from the petition that the bonds therein referred to, or the coupons upon which this action is founded, were ever issued or delivered to the Burlington & Missouri Railroad Company, or to any railroad or corporation, to secure to Nebraska City and Otoe County, in the State of Nebraska, a direct eastern railroad connection, or otherwise, in conformity to an act of the legislature of the State of Nebraska, approved February 15, 1869, entitled "an act to authorize the county commissioners of Otoe County to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the *Burlington & Missouri Railroad Company*, or any other railroad running east from Nebraska City," as in conformity to or with any law whatever of the State of Nebraska, and that said pretended act of the legislature of the State of Nebraska above mentioned is repugnant to the constitution of the United States of America, and to the constitution of the State of Nebraska, and therefore null and void.

"3. And for a further cause of demurrer to the petition the defendant says that the bonds referred to in the said petition claimed to have been issued by the defendant, are not set forth in the petition, but only so much of said pretended bonds as is contained in the coupons thereto attached, and also that such petition and declaration in other respects uncertain, informal, and insufficient."

J. M. Woolworth, for the Plaintiff.

Sweet & Schofield, and *H. M. & A. H. Vories*, for the Defendant.

DILLON, *Circuit Court*.—There are three causes of demurrer set down against the sufficiency of the petition. The ^[341] second ground of demurrer cannot be considered, since it refers to and rests upon matters *de hors* the petition. By the petition it does not appear that the bonds mentioned in the coupons were issued to the Burlington & Missouri Railroad Company or to any railroad company, or to aid in the building of, or to pay for stock in any railroad company whatever.

It is alleged in the petition that the *defendant made and issued* its negotiable bonds, with interest coupons attached; that before the coupons now in suit became due, the bonds together with the coupons for value became the property of the plaintiff, the Chicago, Burlington & Quincy Railroad Company.

The first ground of demurrer raises the question whether the petition must set forth the facts showing that the county commissioners were authorized to issue the bonds.

There are two acts of the State of Nebraska, under either of which (assuming their constitutional validity) bonds to aid in the construction of a railroad (assuming also, the bonds now in controversy to be of this character) might have been properly made and issued by the defendant. (Laws of Nebraska, 1869, pp. 92, 260.)

One of these is a general act to enable public and municipal corporations to borrow money on their bonds, or to issue bonds to aid in the construction of railroads or other works of internal improvement, after the proposition shall have been submitted to and approved by a vote of the people.

The other is a special act "authorizing the county commissioners of Otoe County (the defendant) to issue one hundred and fifty thousand dollars of its bonds to the Burlington & Missouri River Railroad Company, or any other company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, or on such terms and conditions as may be imposed by said county commissioners."

Under which of these acts, if either, the bonds were issued, is not alleged. It appears, however, from an act of the legislature which this court will notice, that on certain terms ^[342] the defendant was authorized to issue its bonds; and bonds having been issued, and being, as alleged in the petition, in the hands

of holders for value, before maturity, the presumption is that the election was held and the other necessary terms complied with, which would authorize the commissioners to issue the bonds.

The question on this record is one of pleading; and a holder, *under such circumstances*, of bonds negotiable in their character is not bound, when suing in the federal courts, to allege in his petition the election or other facts showing a compliance with the preliminary steps required of the officers before they are authorized to issue and deliver the bonds.

Such is the doctrine of the supreme court, which it is obligatory on this court implicitly to follow. If, in the given case, the authority to issue bonds did not arise or exist, and the corporation is not liable thereon, the facts may be pleaded in defense. (*Commrs. of Knox County v. Alsop*, 21 How. 539; *Moran v. Commrs.* 2 Black, 722; *Rogers v. Burlington*, 3 Wall. 654; *Cincinnati v. Morgan*, 3 Wall. 275; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 220; *Curtis v. County of Butler*, 24 How. 435; *Bissell v. Jeffersonville*, 24 How. 287; *Meyer v. Muscatine*, 1 Wall. 385; *The City v. Lamson*, 9 Wall. 477; *Supervisors v. Schenck*, 5 Wall. 782; *De Voss v. Richmond*, 7 Am. Law Reg. (N. S.) 589.)

The averments in the petition show *prima facie* a liability; and this view is entirely consistent with the case of *Marsh v. Fulton Co.* 10 Wall. 679, recently decided by the supreme court. The result as well as the reasoning of Mr. Justice Field in that case is entirely satisfactory to my mind.

It only remains to add that it is not necessary to set out in the petition the bonds to which the coupons are attached. (*Commissioners etc. v. Aspinwall*, 22 How. 364; *Thompson v. Lee Co.* 3 Wall. 327; *The City v. Lamson*, 9 Wall. 477; *Ring v. Johnson County*, 6 Iowa, 265; *McCoy v. Washington County*, 7 Am. Law Reg. 193; *Johnson v. Stark County*, 24 Ill. 75.)

[343] The constitutional question argued by the counsel for the defendant is not legitimately presented by the demurrer, and is not examined nor decided. The demurrer is overruled, and the defendant has leave to answer.

DUNDY, J., concurs.

Demurrer overruled.

[NOTE.—Constitutional question. See *Gilchrist v. Little Rock*, ante, 281; *King v. Wilson*, post. Remedy of creditor. *Welch v. Ste. Genevieve*, ante, 180; *Muscantine v. Letz*, post; *Lansing v. Treasurer*, post.]

Declaration on County Bonds not bound to contain allegations showing compliance with conditions on which issuance of bonds is authorized.—Followed, *Kennard v. Cass County*, 8 Dill. 149.

Judgment affirmed on appeal, 16 Wall. 667.

DISTRICT OF KANSAS.

[344] KARRAHOO v. ADAMS.

INDIANS—CITIZENSHIP—JURISDICTION.—An Indian residing within the United States is not a “foreign citizen or subject” within the meaning of section 2, article iii., of the constitution, and cannot, on the ground that he is a “foreign citizen or subject,” maintain a suit in the circuit court of the United States.

Id.—FOURTEENTH AMENDMENT.—As to the effect of the fourteenth amendment upon the *status* of the Indians, see note at the end of the opinion.

Before DILLON, J., and DELAHAY, J.

THIS is an action of ejectment brought by the plaintiff, Mary Karrahoo, in the circuit court of the United States for the district of Kansas.

There is no allegation in the petition respecting the residence or citizenship of the defendant.

[345] The following are the only averments intended to show jurisdiction in this court:—

“The plaintiff, Mary Karrahoo, states that she is not a citizen of the United States, but that she is an Indian, a member of the Wyandotte nation of Indians, and that she has never been made, or consented to become, a citizen of the United States of America.”

By way of amendment the plaintiff further alleged, “that she is not a citizen of the United States, or of any State in the United States, but that she is an Indian, a member of the Wyandotte nation of Indians, and that she has never been made a citizen of the United States, or of any State; that under the provisions of the treaty made between the Wyandotte nation of Indians and the United States, concluded the 31st of January, 1855, and ratified by the President of the United States the 1st day of March, 1855, she did make application to the commissioners appointed under the provisions of said treaty to be exempted from the operation of said treaty, declaring the Wyandotte Indians to be citizens of the United States, and that an Indian agent might be continued to her and her associates, and the assistance and protection of the United States extended to her as such Indian.”

The treaty thus referred to will be found in 10 U. S. Stats. 1159. It may be remarked that there is no statement in the petition that the plaintiff is taxed or taxable. The defendant moved to dismiss the cause out of the court for want of jurisdiction over the same. It was admitted in argument that the defendant was a citizen of the State of Kansas, and was to be so considered by the court in disposing of the motion.

Wilson Shannon, for the Motion.

Jesse Cooper, contra.

DILLON, *Circuit Judge*. — The action is ejectment for a tract of land situate within the limits of the State of Kansas; ^[346] and there is no allegation in the petition showing that the case is one arising under the constitution, laws, or treaties of the United States. There is no suggestion that this court has jurisdiction by reason of the subject-matter or character of the action.

It is also to be observed that there is no claim that the court has jurisdiction because the controversy or suit is one between "citizens of different States," for the plaintiff has, by express averment, declared that she is not a citizen of the United States or of any of the States. No question is therefore presented as to the operation or effect of the recent amendment to the constitution, or the Act of Congress of April 9, 1866 (14 U. S. Stats. 27, § 1), upon Indians who are taxed. The plaintiff is a Wyandotte Indian, residing in this State; and reference is made in the petition to the treaty of that tribe with the United States, made January 31, 1855. (10 U. S. Stats. 1159.) This treaty, among other things, dissolves the tribal relations of the Wyandotte Indians, and declares them "to be citizens of the United States to all intents and purposes, and entitled to all the rights, privileges, and immunities of such citizens, and subject to the laws of the United States and of the Territory of Kansas." But this treaty excepted, in this particular, such Indians as applied to be exempt from its operation, among whom was the plaintiff. Since then, Kansas has been admitted into the Union as a State. The counsel for the plaintiff maintains that the courts of the United States have jurisdiction under that portion of section 2 of article iii. of the constitution, which *inter*

alia, provides that "the judicial power shall extend to controversies between a State or citizens thereof, and foreign states, citizens, or subjects." The claim is that the plaintiff, within the meaning of the clause just quoted, is a *foreign citizen or subject*.

This is not so. Indian tribes residing within the United States are not foreign states. In the case of *The Cherokee Nation v. The State of Georgia*, 5 Peters 1, 19, the supreme ^[347] court of the United States held, after mature deliberation, "that an Indian tribe or nation, within the United States, is not a foreign state or nation in the sense of the constitution, and cannot maintain an action in the courts of the United States "on the grounds that it is a foreign state." If, as thus held, the tribe is not a foreign state, it necessarily results that the persons composing the tribe are not foreign citizens or subjects. Since the Indians are within the jurisdiction and subject to the laws of the United States, or the different States within which they reside, or both, it is difficult to see on what ground, or with what propriety they can be regarded as *foreign* citizens or subjects. (*Mackey v. Coxe*, 18 How. 100, 104, per McLean, J.; *Worcester v. State of Georgia*, 6 Peters, 515.)

Where Indians reside within the limits of a State, the relations which they bear respectively to the State and to the national government are very peculiar, and frequently present difficult and perplexing questions. (*United States v. Yellow Sun*, ante, 271, and cases cited; *McCracken v. Todd*, 1 Kan. 148; *Hunt v. State*, 4 Kan. 60.) But no such questions now arise, and since there is no provision in the judiciary act, or any other act of Congress giving to the courts of the United States jurisdiction in civil suits by or against Indians, we need not consider whether such jurisdiction could be constitutionally conferred by Congress as respects Indians not citizens, living within State limits, and with respect to cases not arising under the constitution, laws, or treaties of the United States.

That Indians are not *foreign* citizens or subjects within the meaning of the constitution, and that the court has no jurisdiction of the present suit, will further appear by reference to the eleventh section of the judiciary act, which prescribes the jurisdiction of the circuit court of the United States. This

section of the act makes no mention of Indians, and does not use the words, "foreign citizens or subjects"; but instead thereof, it gives the circuit courts jurisdiction where ⁽³⁴⁹⁾ *an alien* is a party, showing quite clearly that the framers of this famous statute understood the words of the constitution "foreign citizens or subjects," to mean aliens, and not resident Indians.

Again, it is to be remembered that the circuit court is a court of limited jurisdiction, and can exercise it only in cases in which it is expressly conferred by Congress.

There is no act of Congress which undertakes to confer such jurisdiction in favor of an Indian not a citizen, but resident within a State and against a citizen of the State.

The motion to dismiss the cause must prevail.

DELAHAY, J., concurs.

Motion sustained.

[NOTE. — The provisions of the fourteenth amendment are as follows:—

"All persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States, and of the States wherein they reside.

Representation shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed.*"

Mr. Senator Carpenter, from the Senate judiciary committee, which was instructed to inquire into the effect of this amendment upon Indian tribes and treaties, reported to the Senate, December 14, 1870, that the committee was of opinion "that the Indian tribes within the limits of the United States, and the individual members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, *subject to the jurisdiction* of the United States; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment; and if so, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment.

In the *United States v. Shanks*, 15 Minn. 369, it was held, first, that part of the Indian reservation described and provided for in the treaty made with the Chippewa Indians, Feb. 22, 1855, 10 U. S. Stats. 1166, which was granted to the chief Hole-in-the-Day, under the exception and stipulation contained in the subsequent treaty of May 7, 1864, 13 U. S. Stats. 693, continued to retain its character as an Indian reservation notwithstanding such grant. Second, Hole-in-the-Day, a chief of the Chippewas with whom the United ⁽³⁴⁹⁾ States had treaty relations, and an Indian of unmixed blood, and residing at the time of his death upon the land so granted to him, was not a citizen of the United States, nor of the State of Minnesota, and though said land lay within the territorial limits of Cass County, which was attached to Morrison County, the probate court of the latter county possessed no jurisdiction over his estate.

Criminal jurisdiction of federal courts over Indians (*United States v. Yellow Sun*, ante, 271); operation of internal revenue laws in the Indian country (*United States v. Tobacco Factory*, ante, 264; S. C. 11 Wall. 616); civil jurisdiction of State courts, *Ex parte Forbes*, infra.]

Circuit Courts have no Jurisdiction Except such as is expressly conferred by Congress. — Cited, *Harrison v. Hadley*, 2 Dill. 284.

SWOPE v. PURDY.

KAW HALF-BREED LANDS—INDIAN RESERVATION—TAX TITLES.—A sale of lands for taxes in Indian reservation not subject to State taxation is void.

TAX TITLES—VALIDITY ON LANDS EXEMPT BY FEDERAL AUTHORITY.—A State Statute of Limitations is not applicable to a sale of lands exempted, by federal authority, from State taxation.

Before MILLER, J., and DELAHAY, J.

THIS action was brought by plaintiff to recover possession of a section on reserve No. 16, of these lands. Plaintiff offered in evidence the treaty made with the Indians in 1825, in which a reservation of the lands in controversy was made to one Joseph Butler, who conveyed the same to the plaintiff.

Defendant offered in evidence a tax deed for the land in controversy, and deed from Joseph Butler, reservee to R. S. Stevens, dated August 15, 1860 (to show outstanding title).

J. T. Morton, for the Plaintiff.

W. Shannon, for the Defendant.

MR. JUSTICE MILLER delivered an opinion, holding:—

1. That the legal title to the land reserved to Butler did not vest in him by the treaty of 1825.

[350] 2. That although the first section of the Act of 1860 concerning these reservations, if standing alone, was sufficient to vest a full fee simple title in Butler, with right of alienation, yet by the second and third sections of that act the right of alienation was taken away and vested in the United States in trust for Butler. The deed of Butler prior to July 17, 1862, therefore conveyed no title. (*Stevens v. Smith*, 2 Kan. 243; *Brown v. Belmade*, 3 Kan. 41.)

3. That under the decision of the supreme court of the

United States, in the case of *Blue Jacket v. Johnson County*, at the December term, 1866, lands so situated were not liable to State taxation. (*The Kansas Indians*, 5 Wall. 737.)

4. Consequently the tax sale and tax deed were void, and conferred no title.

5. The fifty-seventh section of the tax law of Kansas, which forbids suits to be brought for lands sold for taxes unless brought within two years after the tax deed is recorded is not applicable to this case for two reasons: *First*, that the same act requires a tax deed to be witnessed and acknowledged before it is entitled to be recorded, and this tax deed is not witnessed; *second*, because the exemption of the land from State taxation, being an exemption prescribed by federal authority, no legislation of the State can extend the effect of its laws for taxation over lands exempted by federal authority.

6. The joint resolution of Congress of July 17, 1862, removed the restriction of the right of alienation imposed by the second and third sections of the Act of 1860, and therefore the deed made in 1864 by Butler to plaintiff conveyed the legal title.

The plaintiff is therefore entitled to recover the possession of the land.

Judgment accordingly.

[351] HOLMES v. SHERIDAN ET AL.

PRACTICE—TRESPASS AND FALSE IMPRISONMENT—CONSOLIDATION OF CAUSES.—

Where two actions against the same defendants, one for trespass to the person, and the other for trespass to property, arose out of the same transaction, and might have been joined, the court, instead of ordering them to be consolidated, directed that they be tried at the same time and to the same jury.

MILITARY OFFICER—POWER TO ARREST FOR FRAUD ON GOVERNMENT.—A major-general in command of an army in the field in the Indian country may lawfully issue an order to arrest a person therein who has induced friendly Indians to steal cattle for him, with a view to turn such cattle over to the government under contracts to supply the army with beef; and the fraudulent possessor of such cattle cannot recover for them against the officer who, for such reasons, ordered their seizure.

POWER OF MILITARY COMMANDER TO TAKE PRIVATE PROPERTY UNDER URGENT NECESSITY.—A military commander, under circumstances of actual, urgent,

and immediately pressing public necessity. may justify the taking of the private property of the citizen ; in which case the citizen must look alone to the government for compensation. The existence of such necessity is a question for the jury. and must be clearly established by the party who alleges it.

MILITARY OFFICER—ARREST OF CONTRACTOR FOR FRAUD—SPEEDY TRIAL.—Army contractors, their agents and assignees, or employees in the course of the execution of their employment, are subject to the rules and articles of war, and are liable to arrest by the military commander for frauds against the government under their contracts; but the officer making arrests must proceed, with reasonable diligence, to have the person arrested brought to trial.

PERSONAL LIABILITY OF MILITARY COMMANDERS—DAMAGES.—Rules governing the measure of damages in actions against an officer for false imprisonment, stated.

Before DILLON, J., and DELAHAY, J.

Actions for trespass and false imprisonment.—These were actions of trespass against Philip H. Sheridan and John H. Paige—the one for trespass to the person, and the other to the property of the plaintiff. They were removed into this court from the State court, and, after removal, ordered to be tried at the same time and to the same jury. The defendant Sheridan was a major-general in the army of the United States, and the other defendant Paige was a major under the command of General Sheridan. The United States government assumed the defense of the actions. The nature of [253] the suits, as well as the defenses, and the questions arising, fully appear in the charge of the court.

Mr. Sherry, and Mr. Green, for the Plaintiff.

Mr. Horton, District Attorney, and Mr. Wheat, for the Defendants.

DILLON, *Circuit Judge*, charged the jury as follows:—

1. Under the statutes of the State relating to practice, adopted in this court, these two actions, which were originally brought in the State court, and afterwards removed into this court, might have been joined, and as both actions arise out of the same transaction, this court directed that they be tried at the same time and to the same jury. You are empanelled to try them; but you will consider them separately, the same as if each was alone before you. Both are actions in the nature of trespass, the one to the property, the other to the person of the plaintiff.

In the action for trespass to property, the plaintiff asks to recover for certain cattle, which he claims that the defendants, on or about February 1, 1869, in the Indian territory, took and converted to their own use, to the plaintiff's damage, in the sum of seven thousand nine hundred dollars.

In the other action the plaintiff claims for his alleged false imprisonment by the defendants, laying his damages in the sum of twenty-five thousand dollars.

The answers are in denial, and they also set up various defenses by way of justification. The nature of these pleas in justification, and what is necessary to sustain them, will be referred to presently.

2. Certain facts, either admitted on the trial or not controverted, may first be referred to. The transaction under investigation took place in the "Indian country." The plaintiff, for himself or others, or both, was in possession of a herd of cattle, the same for which the present action is instituted. The defendant, Sheridan, was a major-general in the army of ~~the~~ the United States, and was in command of an army force in the Indian country; and it is alleged that there was a war then being prosecuted by and under the direction of the defendant, as commander, against hostile Indians in the said territory.

On January 22, 1869, General Hazen, in command in the Indian territory, under direction of General Sheridan, issued a written order to one Lieutenant Doyle, to investigate alleged irregularities in the Indian department of the Indian territory. On January 26, 1869, Lieutenant Doyle made a written report to General Hazen, stating that, "In regard to the cattle stolen by the Caddo Indians, I have the full particulars. Don Carlos made a clean breast of it"; and he then proceeds to state, in substance, that the Caddo Indians had been induced to steal the cattle; that Don Carlos, Griffenstein, *and the plaintiff* were concerned in the illegal enterprise of inducing the Caddo Indians to go and steal the cattle, and bring them up with a view to be *sold or turned in to the government under army cattle contracts*. This report was laid before General Sheridan, and it is an undisputed fact that he ordered the cattle, now sued for, to be seized, and the plaintiff to be arrested, which were done, and the plaintiff was confined and put under guard. The cattle thus

seized were afterwards turned over to the quartermaster's department and butchered, and fed to or otherwise used by the army. The plaintiff was kept in confinement for some time, and afterwards released by order of General Schofield, the successor in command of General Sheridan.

The defendant Paige was a major in the army under the command of General Sheridan, and his part in the transaction consisted in obeying or executing the order of his superior officer.

3. The court will first instruct you in reference to the suit for the cattle.

The plaintiff being in possession of the cattle, and the same having been seized by order of the defendant, Sheridan, the plaintiff is presumptively entitled to recover their [354] value; that is, he is entitled to recover, unless the defendants have established some one or more of the defenses set up in the the answers. These defenses will now be stated.

If you believe from the evidence that the cattle, for which the action is brought, were stolen, or taken from their owners without their consent, even though such owners may then have been, or may yet be, unknown, and if General Sheridan was informed of such theft, and that the cattle were intended to be put in on army contracts, then the order of the defendant Sheridan to seize such cattle would be a lawful one, and would not make him liable personally, and would also protect the defendant Paige acting under it.

If you believe from the evidence that the plaintiff was a party to a combination, whereby the Caddo Indians were induced to go to a distance where cattle were allowed to range at large by their owners, and to take them, without the consent of such owners, and bring them up into the Indian country, with a view to sell or trade the same at a low price to those who sent them, so that the latter could sell or supply them to the government; or, if the plaintiff bought these cattle, knowing or having good reasons to know they were thus obtained (if such were the fact), he cannot or ought not to recover, for the law as well as morality decisively condemns such transactions as alike infamous and criminal, and it is the duty, as it should be the pleasure, of the jury thus to decide.

The burden of proof to show that the cattle were stolen and

did not belong to the plaintiff is upon the defendants. This may be shown by circumstances, if they are satisfactory to the minds of the jury.

4. But the defendants claim that even if the cattle were not stolen, and though the plaintiff owned them, they are not liable, because they were seized by the defendant Sheridan upon a *public necessity* for the public use; and if so, the plaintiff's remedy is against the government, and not against its officers personally.

[355] A military commander, according to the decision of the supreme court of the United States, may, under circumstances of necessity, take the private property of the citizen without being liable personally, in which case the owner must look to the government for compensation. But to justify a taking upon this ground, the necessity must be actual and urgent, and immediately pressing; and whether such a necessity existed is a question for the jury.

"In deciding upon this necessity, however," says the supreme court, "the state of facts, as they appeared to the officer acting, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if with such information as he had a right to rely upon there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable ground to believe it to be, and it is then for the jury to say whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that the private rights must for a time give way to the common and public good." (*Mitchell v. Harmony*, 13 How. 115, 135; *Wellman v. Wickerman*, 44 Mo. 484.)

The necessity claimed to exist in the present case is the need of the army in this distant region for animal food to prevent or remove scurvey among the troops, and to preserve or restore their health; of this you will judge, guided by the rules laid down. If such necessity existed, and if the cattle were seized

for this reason, this defense is made out; but if no such necessity existed, or if they were seized for other reasons, this particular ground for defense fails. In determining these questions you will look at and consider all the ^[356] evidence, including the orders given and the reasons assigned by General Sheridan for the seizure in question. If he assigned reasons for his seizure, and did not include or refer to the one now under consideration as one of the grounds of his action, it is a strong if not conclusive circumstance to show that the defense of public necessity is not well founded, but is an after thought.

5. The court will now instruct you in reference to the action for false imprisonment.

If war existed in the Indian territory, and the defendant, Sheridan, as military commander, ordered the plaintiff's arrest upon information of such character that rendered it probable that the plaintiff and others were guilty of the acts recited in the order for his arrest, and if there were no civil officers in the territory before whom the plaintiff could be prosecuted, then such arrest would be justifiable. But it would be the duty of the defendant after making such arrest to proceed with diligence to bring the plaintiff before a civil tribunal for the offenses imputed to him, if the plaintiff was not subject to the rules and articles of war; and if he was thus subject to such articles, then before the proper military tribunal.

Contractors and their assignees and employees, when in the course of the execution of their employment, are subject to the rules of war, and are liable to arrest and punishment for fraud. (Act of July 4, 1864, § 7, 13 U. S. Stats. 394; Act of July 17, 1862, § 16.)

If the defendant failed to discharge the duty above set forth, and either arrested the plaintiff unlawfully, or kept him in confinement without trial an unreasonable time, he would be liable to the plaintiff. If you find that the plaintiff was a contractor or agent of a contractor, or an assignee thereof, for supplies for the army, and that he was endeavoring to practice a fraud upon the government, such as is claimed by the defendants, then the defendant, Sheridan, would, under the above-mentioned acts of Congress, have a right to cause ^[357] his arrest, and would not be liable therefor; nor for his subsequent con-

finement, unless it is shown that the imprisonment was unreasonably long, or proceeded from malice, cruelty, or a desire to oppress and injure the plaintiff.

6. If you find for the plaintiff in either or both cases, you will have to ascertain the amount of his damages.

If the plaintiff is entitled to recover for the cattle, or any part thereof, the fair, actual market value of the cattle at the time and place of seizure is the measure of the damages. In respect to the action for false imprisonment, the measure of the plaintiff's damages (if he is found entitled to recover) is the actual loss sustained, unless the acts of the defendant were wanton, malicious, and oppressive; not done in good faith, but to injure the plaintiff; in which latter case the jury, not to reward the plaintiff, but to punish the defendant and make an example of his conduct, may give, in addition to actual damages, such sum as exemplary damages as they deem fitting and reasonable. But the jury should not go beyond actual damages unless it is shown that the defendant's conduct towards the plaintiff did not proceed from good motives and in the honest discharge of his official duties, but from a disposition or desire to oppress or injure him.

Paige stands, as to liability or non-liability, upon the same footing with Sheridan. If Sheridan's orders were lawful or justifiable, then they protect Paige, who acted under them. If unlawful, they will not constitute for Paige a defense, even though he was a subordinate officer. (*Mitchell v. Harmony, supra.*)

The jury found a verdict for the defendants.

Judgment accordingly.

Note. Courts may in their Discretion refuse to consolidate causes. — Followed, *Keep v. Indianapolis & St. L. R. R. Co.* 3 McCrary, 309; S. C. 10 Fed. Rep. 459.

[358] SOHN v. WATERSON.

KANSAS STATUTE OF LIMITATIONS CONSTRUED.—The Act of the Kansas legislature of February 10, 1859 (Comp. Laws Kansas, 1862, p 232), providing that actions on contracts made and judgments rendered *beyond the limits of the State*, "shall be commenced within two years after the cause *shall have accrued*," should have a prospective operation; and where the defendant resided in the State when that act took effect, the creditor has two years thereafter within which to bring suit; but if he was not such resident, the statute does not begin to run in his favor until he comes into the State.

ID.—EFFECT OF REPEAL OF STATUTE AFTER ACTION BARRED.—After a claim has been fully barred under that act, the defendant's liability is not revived by its subsequent repeal; but he is protected from such liability by express legislative provision.

Before DILLON, J., and DELAHAY, J.

THIS action is brought in this court by the plaintiff, a citizen of Ohio, upon a judgment which he recovered against the defendant, in the court of common pleas of Butler County, in the State of Ohio, on the 17th day of October, 1854. It is alleged in the petition that the defendant is now a citizen of the State of Kansas, *and has been a citizen and resident of said State ever since the year 1854.*

The defendant pleads, in defense, that the action is barred by the limitation statutes of the State of Kansas; first, that it is barred because it was not brought within *two* years; second, because not brought within three years; and third, because not brought within ten years after the cause of action accrued.

To these pleas the plaintiff demurred, and their sufficiency was the question argued and submitted to the court.

N. C. McFarland, for the Demurrer.

Wilson Shannon, opposed.

DILLON, Circuit Judge.—On the argument the defendant's attorney stated to the court that he relied exclusively upon [359] the plea that the action was barred, because not brought within *two* years after the right of action accrued; and to this single question our opinion is limited.

The present action was commenced in this court in August, 1870. It was founded upon a judgment rendered in Ohio, in 1854. It was alleged and admitted that the defendant came

into this State to reside and has resided here ever since the year 1854.

Since the defendant claims nothing from the statute of 1855 (Laws of 1855, 96), nor from that of 1858 (Laws of 1858, 66, 67, § 18), but rests the sufficiency of his plea upon the Act of February 10, 1859 (Comp. Laws of Kansas, 1862, 232), and the twenty-fifth section of the limitation act in the statutes of 1868 (Comp. Laws of Kansas, 1862, 635, § 25), it is not necessary to refer at length to other statutory provisions noticed by counsel in the course of the argument.

By the above-mentioned Act of February 10, 1859, it is provided that "all actions founded on any promissory note contract, *judgment*, decree, or other legal liability made, executed, rendered, entered into, or incurred *beyond the limits* of this Territory, shall be commenced within two years next after the cause or right of such action shall have accrued, and not after."

This act was amendatory of the general statutes of limitations then in force, which contained no provisions in terms applicable to foreign judgments; but which did contain a provision that "if, when a cause of action accrues against a person, he be out of the Territory, the period limited for the commencement of the action shall not begin to run until he comes into the Territory." (Comp. Laws, 1872, 128, § 28.) The two acts are in *pari materia*, and are to be read together.

This Act of February 10, 1859, it is admitted is not now in force, but it remained in force more than two years after it went into effect. In fact it continued in force until it was repealed by the statutes of 1868. In the general statutes of ^[see] Kansas of 1868, there is, it is conceded, no provision limiting actions on foreign or other judgments. This was probably a *casus omissus*. But the chapter on limitations of actions (ch. 80, art. iii.), contains the following: "Sec. 25. When the right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or defense." (Gen. Stats. 1868, p. 635.) This enactment took effect October 31, 1868. And by another provision it is enacted that the repeal of a statute shall not affect any right which accrued thereunder. (Gen. Stats. p. 1128, § 6.)

As the defendant was a resident of this State when the Act of

February 10, 1859, took effect, it is our opinion that the two years' limitation therein provided began to run in favor of the defendant as against the present cause of action, from that period, and that this action might have been brought at any time within two years after that act went into operation. Not having been brought within that period it was barred; and under the statute provisions before mentioned, the repeal in 1868 of the Act of 1859, did not revive the liability of the defendant, or affect the right of the defendant which accrued thereunder to have the present cause of action treated and held as barred thereby.

But however this might be, independent of the above mentioned section 25 of chapter 80, article iii., of the general statutes of 1868, it seems perfectly clear that the effect of that section is to continue to the defendant the benefit of limitation provided by the Act of 1859. Its language is that "when the right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or defense."

The present right of action was barred by the Act of 1859, before it was repealed, and by the express terms of the statute that right is not now available to the plaintiff.

The argument made by the plaintiff against the effect of section 25, is that a statute, merely, never bars a right of action; that to operate as a bar a suit must be brought, and ^[see] the Statute of Limitation pleaded, or specially relied on; and hence as no suit was brought on the judgment while the Act of 1859 was in force, the right of action is not barred. But this is not the meaning of the legislature. Such a construction of section 25 would quite nullify the statute, and deprive it of practical effect, making it either useless or unavailing. The provision of this section would be useless if the Act of 1859 had been successfully pleaded to a suit brought while it was in force; unavailing if successfully set up in such a suit.

As it is our opinion that the Act of 1859 would not begin to run, if the defendant was a resident of the State, until the date of its taking effect, and if he was not a resident when it took effect, then not until he became such, it follows that the defendant's proposition that the statute is void and wholly inoperative, as respects the plaintiff's cause of action, because it barred it

instantly upon its going into operation, is not applicable to the case.

This giving to the statute a prospective operation, notwithstanding its language that the "action shall be commenced within two years next after the cause or right of such action shall have accrued, and not after," is consonant with justice, with established rules of construction, and is necessary as applied to past or pre-existing causes of action, arising out of the State, to prevent the complete overthrow of the legislative intention which was to provide a limitation period in such cases.

When viewed, as all cases ought to be, in the light of the special facts on which they were decided, this construction is not in conflict, but rather in harmony with the questions ruled in the cases referred to by counsel as having been decided by the supreme court of the State. (*Auld v. Butcher*, 2 Kan. 135; *Bonifant v. Doniphan*, 3 Kan. 26; *Hart v. Horn*, 4 Kan. 232.)

The precise point here involved does not seem to have been adjudged by that court, but we feel quite satisfied that they would not decide it otherwise than we have done.

DELAHAY, J., concurs.

Judgment accordingly.

Note. Judgment affirmed on appeal, 17 Wall. 596.

[363] ARNOTT v. WEBB.

FOREIGN JUDGMENT—DEFENSES TO ACTION ON.—In an action on a foreign judgment the debtor may plead as a defense that he was not served with a process, and that the attorney who entered an appearance and filed an answer for him, had no authority to do so.

RIGHTS OF ASSIGNEE OF FOREIGN JUDGMENT.—Where one of several joint or co-partnership debtors himself pays off the judgment to the creditor, and causes it to be assigned to a third person, who advanced to the debtor the money with which he paid it, on an understanding *between them* (to which the creditor was not a party, nor the other joint debtors), that he was to have the benefit of the assignment as a security for his loan. *Held*, that such assignee could not maintain an action against the other debtors, on the judgment thus assigned to him.

Before DILLON, J., and DELAHAY, J.

AN action was brought in New York by a firm creditor against the three members of the firm, *after dissolution*, on promissory notes made by the firm. Two of the defendants lived in that State, and the other, the present defendant, resided in Pennsylvania. No summons or other process was issued in the New York action; but an answer was filed by attorneys at law for *all* of the defendants. Judgment was rendered in that action against all of the defendants; and the record thereof contains no recital as to the personal appearance of the present defendant (Webb); but only "that the defendants appeared and answered" by attorney, and such an answer is on file, and of record.

An action on this judgment was brought against the said Webb, by an assignee thereof in this court.

Thatcher & Wheat, for the Plaintiff.

Webb, Burns & Case, for the Defendant.

PER CURIAM (DILLON, J., and DELAHAY, J., concurring). — *Held* (1), that the defendant was not estopped by the record of the New York judgment from showing as a defense that he was [363] never served with process, and never appeared to the action, and never employed, or authorized, or assented to the employment of the counsel who filed the answer. (*Shelton v. Tiffin*, 6 How. 163; *Harshey v. Blackmarr*, 20 Iowa, 161, and cases cited at pp. 172, 173; *Rogers v. Gwinn*, 21 Iowa, 58; *Bryant v. Williams*, 21 Iowa, 329; *Pollard v. Baldwin*, 22 Iowa, 328; 5 Am. Law Reg. (N. S.) 385.) *Held* (2), that if after the rendition of said judgment in New York, one of the joint debtors paid the same to the creditor, and colorably procured an assignment thereof to be made to the present plaintiff, the latter could not recover thereon, even though he may have loaned the said judgment debtor the money with which he paid the judgment, and have made such loan on the understanding *between them* that he was to have the benefit of an assignment of the judgment as security for his advance or loan to such judgment debtor.

EX PARTE FORBES AND PUCKET.

NATIONAL AND STATE COURTS — JURISDICTION — HABEAS CORPUS. — Federal courts or judges cannot discharge persons from custody under process for contempt, issued by a State court in the course of a suit pending therein, even though it relates to property of Indians, over which, under special treaties and acts of Congress such State court has no jurisdiction.

ID. — PARTITION — INDIAN LANDS. — A State court has no jurisdiction over a partition suit in relation to lands of the Shawnee Indians which have never been conveyed with the approval of the secretary of the interior.

Before DELAHAY, J.

THIS was an application to the district judge of the United States for the district of Kansas, for the discharge from the custody of the sheriff of Wyandotte County, of the above named petitioners. A writ was allowed, directing the persons named to be brought ^[364] before him, which was returned with the bodies of the relators. The material facts are these:—

In November, 1854, a treaty was made between the Shawnee Indians and the United States, wherein it was stipulated that two hundred acres of the "Shawnee reservation" of lands should be allotted to each member of the tribe; and where the allottees were minors, the shares of such minors were to be patented to the head of the family for their benefit. The treaty also provided that the patents should be issued with such restrictions for the benefit of the Indians as Congress might provide. In pursuance of this provision, in 1859, Congress enacted that the restriction referred to should be such as might be prescribed by the secretary of the interior; and as such restriction, that officer directed that the patents should contain a clause providing that the Indians or their heirs should never alienate lands so allotted and patented to them, without the consent of the secretary of the interior.

Under this treaty certain of said Shawnee lands were allotted to Mary McLane, and patented to Sophia McLane, as the head of the family of which Mary was a member. The petitioners were in possession of portions of said lands, under supposed conveyances from said Mary, which were executed in the presence of the agent of the United States for the Shawnees, and were paid for to his satisfaction. The conveyances were for-

warded to the secretary of the interior for his approval, but it does not appear that they ever have been approved by that officer.

One of the heirs of Sophia McLane, claiming to own an undivided half of the lands patented to her, commenced a proceeding in the district court of Wyandotte County for the partition thereof, denying that the petitioners herein had any rights therein, and alleging that the petitioners were committing waste thereon. Upon that petition the said court made an order restraining the petitioners herein from committing waste upon said lands, pending the suit for partition. [365] For an alleged violation of that order the petitioners were, by order of that court, committed to the custody of the sheriff of Wyandotte County, as for contempt; which is the imprisonment from which they seek to be discharged.

Glick & Todd, for the Petitioners.

Scroggs & Sharp, opposed.

DELAHAY, *District Judge*. — If it were necessary to a decision in this proceeding, that the jurisdiction of the State court of the subject-matter in controversy, in the proceedings before it, should be inquired into, it would be sufficient, in my opinion, to refer to the case of the *Kansas Indians*, 5 Wall. 737, in which the supreme court of the United States, speaking of the Shawnees, says: "As long as the United States recognize their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." There can be no question of the applicability of this language to the suit in Wyandotte County, as it is made clearly to appear that the Shawnees still maintain their tribal relation to the United States, and are still recognized by the government as an Indian tribe or nation; and that the secretary of the interior never has approved the conveyances under which the petitioners claim. The deeds are entirely void until approved by that officer; and until they are so approved, the lands of the Shawnees are as wholly beyond the jurisdiction of the State courts as if they were situated without its geographical limits, as will be seen by reference to the peculiar

provisions of the act admitting Kansas as a State. (See also *United States v. Ward*, 1 Woolw. 17.)

But that is not a question to be inquired into in this proceeding. The first question that it is necessary to consider, is whether a judge of a federal court has jurisdiction in the premises; and the legislation of Congress, happily, has left ^[see] no room for doubt upon that subject. The Judiciary Act of 1779 (1 U. S. Stats. 81, § 14) gave the general power to issue the writ, but, in a proviso, declared "that it in no case shall extend to prisoners in jail, unless when they are in custody under, or by color of, the authority of the United States; or are committed for trial before some court of the same; or are necessary to be brought into court to testify." The Act of 1833 (4 U. S. Stats. 634, § 7) provides that the federal judges shall have the power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." The Act of 1842 (5 U. S. Stats. 539) extended the power to courts where *aliens* were confined, under State authority. The Act of February 5, 1867 (14 U. S. Stats. 385), gave power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

To be unmistakably explicit, it will be observed that Congress did not stop with providing in what cases the writ might be issued by federal courts and magistrates. Certain cases are mentioned in which it shall not be allowed, conspicuous among which is the case where the applicant is in confinement under the laws of a State, by order of a court thereof. If he be confined contrary to the constitution and laws of the United States, the federal authorities may issue the writ. But the proofs in this case show distinctly and clearly that the petitioners were not in that category. They are in confinement, illegally perhaps, under the order of a State court, in a matter, it may be, over which it had no jurisdiction; but that does not necessarily give them access to the federal judiciary, since they can administer no relief unless the case is provided for by federal legisla-

tion. Very manifestly, this case is not such an one; I am, therefore, ^[367] obliged to set aside the writ heretofore allowed, and leave petitioners in the custody of the sheriff of Wyandotte County.

Ordered accordingly.

[NOTE. — As to jurisdiction over Indians, see *Karrahoo v. Adams*, ante, 344; *United States v. Yellow Sun*, ante, 371; *United States v. Tobacco Factory*, ante, 264.

Respecting non-interference of State and national courts with the process and operations of each other, see *Ex parte Holman*, 28 Iowa, 88.]

Persons in Custody under Process of State are beyond jurisdiction of federal courts or judges. — Followed, *U. S. v. Van Fossen*, 1 Dill. 411.

MCBRATNEY v. USHER.

REMOVAL OF CAUSE — REQUISITES TO. — In a case removed from a State court to the United States court under section 12 of the judiciary act, it is incumbent on the party who applies for the removal, to file in the latter court, not only a copy of the summons, or other process, but also of the declaration, petition, or bill, the petition for the removal, and the order, if any was made, of the State court thereon.

ID. — “PROCESS” DEFINED. — The word “process,” used in this section, is equivalent in meaning to the word “proceedings.” *Arguendo*, per DILLON, Circuit Judge.

PRACTICE ON REMOVAL. — The practice of the court in causes thus removed, stated.

Before DILLON, J., and DELAHAY, J.

MOTION by the plaintiff to remand the cause to the State court from which, on the petition of the defendant Usher, it was removed into this court.

The facts pertaining to the motion are these: On the first day of the present term, Usher entered in this court a certified copy of the summons, or process, by which the action was commenced in the State court, and of the returns thereon. No copy of the declaration, or of the petition for the removal, nor of any other paper, is filed in this court. Although both parties concede in argument that an order for the removal of the cause was made by the State court upon the petition of Usher, yet no certified or other copy of this ^[368] order is here produced, entered, or filed. In a word, there is nothing at present on the files of this court

but a copy, properly certified, of the summons and the returns of the sheriff thereon.

These show that the plaintiff commenced, in one of the State courts of Kansas, an action against the Kansas Pacific Railway Company and John P. Usher as defendants; and that the railway company was not served with process, but that Usher was. The plaintiff is stated to be a citizen of Kansas. The ground of the present motion to remand is that the railway company is a corporation created by the State of Kansas, and therefore a citizen thereof, and the defendant Usher, although a citizen of Indiana, is not entitled to have the cause removed. The right to a removal is based on section 12 of the judiciary act.

Mr. Wheat, for the motion.

Mr. Usher, for himself, *contra*.

DILLON, *Circuit Judge*.—It is conceded that the order for the removal was made under section 12 of the judiciary act. The ground of the motion to dismiss the cause from this court, and to remand it to the State court is, not that the party procuring the removal has not brought into the court the proper copies of process and proceedings in the court which ordered the transfer, but simply that since there were two defendants, one (the railway company) being a citizen of the State and the other not, the non-resident defendant was not entitled, under this section of the judiciary act, to have the cause removed. If at the time the order for the removal was made there were two such defendants, it is true, according to the settled construction of the Act of 1789, that one of the defendants, though a non-resident, would not have a right to have the cause transferred to the federal court. With the Act of July 27, 1866, giving, under certain circumstances, the non-resident defendant such a right, we have nothing to do. [369] But we do not know from anything now before us that there were two defendants to the cause when the order for the removal was made. Two are named, it is true, in the summons, but only the defendant who procured the removal seems to have been served; and the cause may, for aught now appearing, have been dismissed as to the other defendant, the railway company. If it be conceded that

this company is a resident corporation, and that the court can judicially notice it to be such, still, for the reason above suggested, there is nothing showing the removal to have been improperly ordered. The motion, *on the ground on which it is made*, is not well taken, but for the reasons below given it will be denied, with leave to renew it, if the plaintiff shall be so advised.

The circumstances of the case suggest the inquiry, what is required of the party who procures the removal of a cause to this court under section 12 of the judiciary act, in respect to entering herein copies of the papers filed, and proceedings had in the State court. Assuming the citizenship and amount to be such as to give the right of removal to the non-resident defendant, what must he afterwards do in order to comply with the requirements of the act? It will be recollected that he must apply for the removal before plea or answer, and when there can at most be on file in the State court the summons or other process by which the suit was commenced, and the declaration, petition, or bill of complaint. The act requires the defendant to "file a petition for the removal of the cause," and this should state the grounds on which the party rests his right to the removal, and, in connection with the pleadings, should show affirmatively that such right exists. If the right to a removal is not thus made to appear, the application should be denied by the State court; and if improperly granted, the cause must be dismissed or remanded by the circuit court. Not only is the party to file such a petition, but he must also "offer good and sufficient surety for his entering in such court, on the first day [370] of its session, *copies of said process against him*"; "and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

In the course of the argument the defendant contended that the act did not require him to cause to be transmitted to this court a copy of the declaration, or of the petition for removal, or of the order of the State court thereon; but it is sufficient to enter, without more, a copy of the summons, and afterwards declare anew under the rules and practice of the court. It is our opinion, upon an examination of the whole of section 12

of the judiciary act, that the party who obtained the removal should procure and enter in the circuit court a transcript or certified copy of the summons or other like process, and also of the first pleading filed by the plaintiff, whether a declaration, petition, or bill; and also of the petition for the removal, and any order of the State court thereon.

The language of the act is that if "a suit be commenced in any State court," etc., and the non-resident defendant petitions for the removal, and offers surety for entering in the federal court "copies of *said* process against him," etc., the State court shall proceed no further in the cause, "and the said *copies* being entered as aforesaid," the cause shall proceed as if brought in the United States court by original process.

It argued that the word "*process*" refers to the summons or original writ, and that it is sufficient to enter a copy of this, without more. But our opinion is otherwise. The phrase "*said process*" refers to the "suit commenced"; and as here used, the word "process" is equivalent to the word "proceedings." The word "process" is used as synonymous with the word "proceedings" in the first Process Act of September 29, 1789 (1 U. S. Stats. 94, § 2), passed only five days after the judiciary act. This circumstance ^[371] tends to confirm the view above suggested, but its correctness may, perhaps, be more satisfactorily shown by other considerations.

If it be sufficient, as maintained by the defendant, simply to file or enter a copy of the original process, how, let it be asked, is the United States court to know that any order of removal was ever made or denied by the State court? for such a copy cannot, of course, give any information on these points. If a copy of the original declaration or pleading on the part of the plaintiff is not required to be entered in the circuit court, how is that court to know what the "matter in dispute" is, or its value? and if a new declaration, or petition, or bill be filed, how is it to know that it is the same matter which was set up in the like pleadings filed in the State court? If a copy of the petition for removal is not required, how is the court of the United States to know whether it made a case entitling the party to a removal and authorizing it to take jurisdiction? Since, then, it is absolutely necessary that one of the parties should

put the United States tribunal in possession of these data, it is reasonable to construe the act to require this to be done by the party who sought the removal, and not by his adversary.

The practice of the court will be conformable to these views. It will also be the practice that when the party applying for the removal shall fail, within the time prescribed by statute, to enter a complete transcript of the papers and proceedings in the State court, to permit the adverse party to file the same or the omitted parts thereof, unless cause be shown to the contrary, and the suit will stand and be proceeded in, the same as if all the papers had been filed by the applicant for removal, or in such manner as may be otherwise ordered by the court.

Guided by these suggestions, the parties may take such further steps as they see fit, and meantime the motion to remand will stand denied, with leave to renew it on other grounds before, or on the same grounds after, a certified copy ^[272] of the papers and proceedings in the State court shall have been entered or filed herein.

DELAHAY, J., concurs.

Ordered accordingly.

[NOTE. —See *Sweeney v. Coffin*, ante, 73; construing other provisions of section 12 of the judiciary act, as to the right to remove, and construction of various statutes on that subject, see, also, *Sands v. Smith*, ante, 290; *Case v. Douglas*, ante, 299; *Webster v. Crollers*, ante, 301; *Garden City Manufacturing Co. v. Smith*, ante, 305; *Beecher v. Gillett*, ante, 308.

Under the Act of July 27, 1866, defendants claiming the right of removal need not join, but may apply separately as they are served with process or otherwise brought into court. *Fisk v. Union Railroad Company*, North Dist. N. Y. per Nelson, J., and Blatchford, J.]

On Failure of Removing Party to File Transcript, adverse party may do so. — Cited, *Woolridge v. McKenna*, 8 Fed. Rep. 667.

BROWN v. HIATT.

PROOF OF AGREEMENT TO ACCEPT COLLATERALS FOR DEBT. — A debtor who sets up as a defense that his creditor agreed to accept collaterals held by him in satisfaction of his debt, must establish it; and where such an agreement is alleged to be contemporaneous with the creation of the debt, and is not mentioned in the written assignment of the collaterals, and where the collaterals are less in amount than the debt, it was considered by the court as intrinsically improbable.

STATUTE OF LIMITATION—EFFECT OF WAR.—During the whole period occupied by the late civil war, the complainant, a creditor, resided in an insurrectionary State, and the respondent, his debtor, in a State which adhered to the Union. *Held*, that the Statute of Limitations of the State in which the debtor resided was *suspended* by the war, and hence, in computing the time which has run, the period during which the war continued is not to be counted.

Id.—The time is suspended during the war, although the Statute of Limitations had begun to run *before* the war began.

Id.—The case of a creditor living in an insurrectionary State is not distinguishable from one where, as in *Hanger v. Abbott*, 6 Wall. 582, the creditor resided in a loyal State. (*Arguendo*, per DILLON, Circuit Judge.)

Id.—**EFFECT OF ACTS OF CONGRESS.**—The Act of Congress of June 11, 1864, (13 U. S. Stats. 123), is not in conflict with the point above stated, respecting the effect of the war on the Statute of Limitations.

Id.—The Act of Congress of July 13, 1861, (12 U. S. Stats. 255), construed and regarded as contemplating (upon the issue of the proclamation therein authorized), a condition of entire non-intercourse of a pacific [373] character between the inhabitants of the opposing sections, except such as should be authorized by the President; one effect of which legislation was to suspend the remedy and the right to sue upon all contracts, irrespective of the fact whether the creditor residing in the insurrectionary State was, or was not, in sentiment and acts opposed to the rebellion. (*Arguendo*, per DILLON, Circuit Judge.)

Id.—**APPLICATION TO CIVIL WAR.**—The late conflict was a civil war, and was attended with the usual and general incidents of such a war. (*Arguendo*, per DILLON, Circuit Judge.)

STATE STATUTES OF LIMITATION IN FEDERAL COURTS.—State Statutes of Limitation, where Congress has not otherwise specially provided, form rules of decision in the national courts, which will give to them the same effect that they have, or are entitled to, in the courts of the State enacting them. (*Arguendo*, per DILLON, Circuit Judge.)

HOLDER OF COLLATERAL—LIABILITY FOR LOSS.—The holder of a collateral security is not liable for a loss occurring without his fault; nor is he liable for neglecting to sue or look after the security when the person from whom it was received was, by the understanding of the parties, to do this.

CONFISCATION OF COLLATERAL SECURITIES—EFFECT.—Where a collateral security was confiscated under the statute of July 12, 1862 (12 U. S. Stats. 589), because of acts charged against the creditor holding such collateral, and the confiscation proceedings are valid on their face, and have never been set aside or directly assailed. *Held*, that in stating an account between the parties, who were mortgagor and mortgagee, the latter should be charged with the full value of the note so confiscated as his property.

CONFISCATION ACTS—VALIDITY OF DECREE—COLLATERAL ATTACK.—A decree condemning property under the confiscation act, where the record of the proceeding shows that a libel of information was duly filed, and a writ of monition issued, and a return of service that the *res* has been attached, is not void on its face, and cannot be collaterally assailed in a bill to foreclose by evidence that the *res* was always in the possession of the complainant, and hence the marshal's return was not true, and therefore, as there was no seizure, the confiscation proceeding was without jurisdiction, and void.

INTEREST—NOT ALLOWED DURING WAR.—Interest, for special equitable reasons, disallowed during the war to a creditor residing in an insurrectionary State.

Before DILLON, J., and DELAHAY, J.

THIS is a bill by a mortgagee against the mortgagors to fore-

close the mortgage below described. The original bill was filed February 27, 1867. On the 29th day of May, 1860, the complainant, who is now and always has been a citizen of Virginia, while on a business visit to Kansas, loaned the ^[374] respondents, citizens of Kansas, the sum of \$2,000, and took therefor their bond, dated May 29, 1860, for \$2,400, payable May 29, 1861. This bond was secured by a mortgage of even date, executed by the respondents to the complainant upon three hundred and twenty acres of land in Leavenworth County, in the State of Kansas, and is the mortgage of which a foreclosure is now sought. Both parties agree that the respondents gave to the complainant at the same time, as further or collateral security, a note made by one Kenyon for \$800, less a payment of \$75, secured by mortgage. This mortgage was, on the 29th day of May, 1860, on the margin of the record thereof, assigned by Hiatt to Brown "as collateral security for the payment of a bond dated May 29, 1860, payable twelve months after date, for \$2,400, signed by myself and wife to Edward S. Brown."

Respondent at the same time gave complainant, as further or collateral security, a decree or judgment in favor of respondent against one Perkins, secured by mortgage on a house and lot in the city of Leavenworth for \$763.13, and the judgment or decree was assigned on the 29th day of May, 1860, by Hiatt to Brown. This assignment is in terms absolute, but both parties agree that it was made as collateral security to the bond and mortgage now in suit.

Out of these collaterals some of the defenses relied upon arise, and they will be referred to hereafter. The defenses to the present bill of foreclosure are, in substance, these:—

1. A special verbal agreement, made at the time of the loan, whereby the respondents had the right to elect to turn over the Kenyon note and the Perkins judgment to the complainant, in satisfaction of the bond and mortgage now in suit; and it is alleged in the answer that the respondents did elect thus to satisfy the said bond and mortgage, and that the complainant, by letter, assented thereto. The existence of any such agreement, letter, or assent is wholly denied by the complainant.

2. The Statute of Limitations of the State of Kansas, which ^[375] requires an action of this nature to be brought within

three years from the time when the right to sue accrued. The complainant, a resident of the insurrectionary portion of the State of Virginia, relies, to avoid the operation of the statute, upon the proposition that he is, in law, entitled to have deducted from the computation the space of time covered by the war. It is conceded that if this deduction be made, the complainant is not barred, but otherwise he is.

3. The third defense arises out of the two collaterals named above, to wit: the Kenyon note and the Perkins judgment. Respondents claim that these have been wholly lost to them by the fault or neglect of the complainant; and that in making up the account the complainant is equitably chargeable with the amount thereof.

The further facts in this respect are stated in the court's opinion. It is only necessary, in this place, to add that the Kenyon note was confiscated by proceedings in the United States district court for Kansas, in 1863, on behalf of the United States, under the Act of July 17, 1862, on the ground that it was the property or a credit of the complainant, and that he was, as alleged, a rebel or engaged in aiding the rebellion. The complainant contends that this proceeding was procured to be instituted by the fraud of the respondent Hiatt, and that the latter should suffer the loss of the debt against Kenyon, if it be lost.

The property securing the Perkins judgment was, during the war, sold on execution under the direction of the respondent, and bid off in the name of the complainant. It was subsequently decided, by the proper court, that another mortgage, in favor of one Cockrell, had priority over the one which Hiatt had assigned to the complainant, and the sale under this prior mortgage swept away the property, and Perkins had no other property out of which the judgment of Hiatt could be made. The case was submitted to the court upon the amended bill, answer, replication, and the exhibits, documentary, and other testimony.

[376] *H. T. Green & Wilson Shannon*, for the Complainant.

Hiram Griswold, for the Respondents.

DILLON, *Circuit Judge*.—The execution of the bond and mortgage in the suit being admitted, the complainant is entitled to a decree of foreclosure, as prayed, unless some of the defenses relied upon by the respondents have been established. To these we now turn our attention, and they will be separately considered.

1. *As to the alleged agreement to take the collaterals in satisfaction*: It is claimed by the respondent Hiatt that at the time the loan was made of the complainant, and the bond and mortgage in suit were executed, and the Kenyon note was delivered, and the Perkins judgment was assigned to the complainant, that it was verbally agreed (as stated by Hiatt in his testimony on this point), "that, whenever he requested it, the plaintiff was to take the Kenyon note and mortgage and the judgment against Perkins, and release the mortgage from myself to him." The respondent testifies that in 1862 he wrote to the complainant in Virginia, claiming the benefit of this agreement, and that the complainant, recognizing the agreement, wrote in reply that he would accede to his request. The existence of such an agreement the complainant positively denies. He also denies receiving from the respondent a letter making such a request, or writing to him a letter agreeing to accept the collaterals in satisfaction of his debt.

The alleged agreement is not satisfactorily proved. On the contrary, it is perfectly clear to our minds that no such agreement was made. Such an agreement is not consistent with the language of the written assignment of the Kenyon mortgage, which, in terms, states that it was assigned "as collateral security." Again, assuming the Kenyon note and the Perkins judgment to be perfectly good, and worth their face, they do not equal in amount, by several hundred dollars, the sum of money which the complainant actually loaned to the respondent, a circumstance strongly tending to ^[377] show the intrinsic improbability that any such agreement as the respondent now alleges was in fact made.

Again, the letter which he says he received from the complainant, agreeing to take the collaterals in satisfaction of his debt, is not produced, and the writing of any such letter is positively and on oath denied by him. The respondent says this

letter was mailed in Virginia, and fixes its date and receipt at a time when communication by mail between that portion of Virginia and the rest of the United States had entirely ceased.

Again, the respondent's conversation with others, as, for example, Judge Crozier, long after this alleged satisfaction of his debt, in which he distinctly admitted that he was indebted to the complainant in the amount of the bond for \$2,400, now in suit, it irreconcilable with the theory the respondent now propounds, and which we are at present discussing. Without longer dwelling upon this point, we conclude by expressing it as the opinion of the court that this defense is not established.

2. *The Statute of Limitations.* By the Statute of Limitations of the State of Kansas, it is provided that "an action upon a specialty, or any agreement, contract, or promise in writing," shall be brought "within three years" from the time the cause of action accrued. (Laws of Kansas, 1859, ch. 3, p. 84, §§ 19, 20.) Under the thirty-fourth section of the judiciary act, this Statute of Limitations is applicable to the present suit. State Statutes of Limitation, in the absence of provision otherwise by Congress, form the rule of decision in the national courts, which will give to such statutes the same effect that they have or are entitled to in the courts of the States. (*McCluny v. Silliman*, 3 Peters, 270; *Bank v. Daniels*, 12 Peters, 32; *Poterfield v. Clark*, 2 How. 125; *Hanger v. Abbott*, 6 Wall. 532, 537.)

During the whole period covered by the late rebellion, as well as before and since, the complainant resided in and ^[378] was a citizen of the State of Virginia, and of that portion of the State which was declared, by the proclamation of the President, to be in insurrection against the government of the United States. The bond in suit became payable May 29, 1861. This suit was brought February 27, 1867. The complainant claims that in computing the time which has run since his debt matured, he is entitled to have deducted therefrom the period occupied by the war, when all communication between the parties was not only impracticable, but unlawful. If the complainant is entitled to this deduction, it is obvious that the present suit was commenced in time. Equally obvious is it that if the time covered by the war is not to be excluded from the computation, the suit is barred by the statute. The complainant, in

his testimony, which is the only evidence on the subject, says that he was, during the late conflict, simply a private citizen, and was at home, and held, it is to be inferred from his statement, no office, agency, or place in the Confederate States or service. There is no evidence, one way or the other, as to the sentiments of the complainant with respect to the war, or whether he did or did not aid or abet the rebellion. The question is, therefore, to be considered simply as one between an inhabitant of an insurrectionary State, and an inhabitant of a State which "maintained a loyal adhesion to the Union and the constitution."

So far as the court is advised, it is one which, in the form now presented, has never been determined in the supreme court. This circumstance, as well as the gravity and difficulty of the question, will justify, if it does not require, the somewhat extended discussion necessary to present the grounds of the conclusion at which we have arrived.

The leading and up to this time the only decision of the supreme court as to the effect of the late conflict upon State Statutes of Limitation, is that of *Hanger v. Abbott*, 6 Wall. 532. This judgment holds, when a creditor, being a citizen of a loyal State, brings an action on a contract against his [379] debtor, a citizen of and residing in a State which went into the rebellion, that the period during which the creditor was prevented by the conflict from asserting his rights, is not to be included in the computation of time fixed by Statutes of Limitation. The case just cited is, as to parties, the reverse of the present one, for here we have a creditor who is a citizen of a State which was in insurrection, bringing his action against his debtor, a citizen of a loyal State, and claiming the benefit of the same rule of law to which, in the case referred to, it was adjudged that the loyal creditor was entitled. To the case just mentioned (*Hanger v. Abbott*), we shall again have occasion to refer, and to discuss the point whether, in principle, it can be discriminated from the case at bar. On assumption that the question in this case may be different from that determined in the case mentioned, we proceed to an independent examination of the question as to the effect of the war of the rebellion upon the complainant's rights under his contract with the respondents.

Properly to understand the effect of the war upon contract rights, it is necessary to inquire into the nature of the conflict. In view of the doctrines laid down by authoritative writers on public law, of the nature, extent, and duration of the struggle, and of the character of the legislative acts of Congress, and the action of the executive respecting it, there can be no doubt that it was a civil war, attended in law with all the general consequences of such a war, except where Congress has otherwise provided, and where such consequences are inapplicable to the peculiar nature of the struggle, and of our government. "A civil war," Vattel says, "is when a party arises in a State which no longer obeys the sovereign, and is sufficiently strong to make head against him, or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms."

"Civil war breaks the bonds of society and of the government; it gives rise in a nation to two independent parties, who acknowledge no common judge. They are in the position [380] of two nations who engage in disputes, and not being able to reconcile them have recourse to arms. The common laws of war are in civil wars to be observed on both sides. The same reasons which make them obligatory between foreign states render them more necessary in the unhappy circumstances where two exasperated parties are destroying their common country." (Vattel, 54, 3, ch. 18, §§ 290-295.) This language is quoted by Grier, J., in delivering his opinion in the *Prize Cases*, 2 Black, 635. Riquelme says: "When a faction is formed in a State which takes up arms against the sovereign in order to wrest from him the supreme power, or impose conditions on him, or when a republic is divided into two parties which mutually treat each other as enemies, this war is called civil war. Civil wars frequently commence by popular tumults, which in no wise concern foreign nations; but when one faction or party obtains domain over an extensive territory, gives laws to it, establishes a government in it, administers justice, and, in a word, exercises acts of sovereignty, it is a person, in the law of nations; and however so much one of the two parties gives to the other the title of rebel or tyrant, the foreign powers which desire to maintain their neutrality ought to consider both as two States, independent as respects one another and other States,

who recognize no judge of their differences." (*Bello Principios de Derecho International*, cap. 10, 267.) Bluntschli, in his Code of International Law, a recent and learned work, says: "War is an armed contest between different States upon a question of public right." "They recognize the quality of belligerents in armed forces, who, not having been recognized by any State already existing as having the right to contend in arms, have secured to themselves a military organization, and combat in good faith—in the place of and as a State—for a principle of public right." (Bluntschli, 270, 271.) "There is an exception," he continues, "to the rule that wars can take place only between States. When a political party seeks the realization of certain public objects, ^[381] and organizes itself as a State, it becomes in a certain measure the State itself. The laws of humanity demand that the quality of belligerents should be accorded to that party, and that its people should not be considered a mass of criminals."

The late rebellion, tested by these principles, was undoubtedly what is regarded as a civil war—something more than a mere commotion or civil disturbance. The various proclamations of the President, and the various acts of Congress in reference to the war, clearly show that it was treated both by the legislative and executive departments of the government as a civil war, and those in rebellion were accorded all the usual rights of belligerents. Indeed, each house of Congress, by the resolutions of July 22 and July 25 1861, in terms, referred to the conflict as a civil war.

And the contest also has constantly been regarded and treated as a civil war by the supreme court of the United States. This subject first came before the court in the *Prize Cases*, 2 Black, 635, A. D. 1862, and it was held that there existed, in the sense of the international law, a state of civil war between the States in rebellion and the United States, and that it was attended with all the usual incidents of a war between independent nations, such as the right of the government to blockade the ports of the insurrectionary States, to treat their inhabitants as enemies, and to capture their property. In those cases, and in many others since decided, the supreme court has uniformly held that the general rules and principles

of international law are applicable to this conflict, and to the legal questions arising out of it, unless modified by Congress. (*The Venice*, 2 Wall. 258; *Mrs. Alexander's Cotton*, 2 Wall. 404; *The Hampton*, 5 Wall. 372; *The William Bagaley*, 5 Wall. 377; *The Ouachita Cotton*, 6 Wall. 521; *Hanger v. Abbott*, 6 Wall. 532; *Coppell v. Hall*, 7 Wall. 542; *McKee v. United States*, 8 Wall. 163; *The Grapeshot*, 9 Wall. 129.)

In the case of *The Grapeshot*, *supra*, Chase, C. J., remarks that it has often been declared by the supreme court ^(see) that the rebellion was accompanied by all the general incidents of a regular war.

Having thus seen that the late conflict is to be considered as a civil war, and that legal questions arising out of it are to be decided, in the absence of controlling congressional action, by the principles of public law, we next inquire into the effect of this war upon the pre-existing contracts between parties respectively resident in the two hostile sections.

The well-settled doctrine of international law is that contracts made before the war are only suspended by it, and the right and the remedy revive on the termination of it, while contracts made between citizens of the opposing belligerents, during the war, are utterly void.

This doctrine has been repeatedly recognized by the supreme court as applicable to contracts and transactions between the inhabitants of insurrectionary and loyal States in the recent war. (*McKee v. United States*, 8 Wall. 163, 166; *United States v. Lane*, 8 Wall. 185; *Coppell v. Hall*, 7 Wall. 542; and *Hanger v. Abbott*, *supra*; see *Phillips v. Hatch*, *post*.)

In arriving at this conclusion, namely, that unlicensed intercourse during the war was unlawful, and that pre-existing contracts are only suspended by it, the supreme court has frequently had occasion to refer to the legislation of Congress, and particularly to the important Act of July 13, 1861, the essential prohibitions of which continued in force during the whole period of the rebellion.

It is important to notice with care the provisions of the fifth section of this statute. (12 U. S. Stats. 255, 257.)

It authorizes the President to proclaim and declare "the inhabitants" of certain States, "or any section or part thereof,

to be in a state of insurrection against the United States, and thereupon all commercial intercourse, by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, etc., coming [383] from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States." Then follows a proviso authorizing the President, in his discretion and for the public interest, to permit intercourse under regulations to be prescribed by the secretary of the treasury.

This statute is a valid exercise of legislative power; for the Congress of the United States was not, by the rebellion, deprived of the authority to legislate in this manner with a view to its suppression.

Its prohibition of intercourse is as broad as the prohibition, by the laws of nations, in the case of a war between independent States. By recurring to the act, it will be seen to extend to "all" unlicensed "commercial intercourse."

It admits of no exceptions as to persons; for it prohibits intercourse, not simply between citizens of the insurrectionary States who were, in fact, disloyal, and citizens of loyal States, but it makes unlawful all unlicensed intercourse between all citizens of the hostile States or sections. All goods are prohibited to come from the insurrectionary sections into the other parts of the United States, and all goods are prohibited, likewise, from being sent from loyal to disloyal States. Vessels and vehicles are prohibited from conveying persons to or from the respective States or sections.

It is obvious that this act contemplates a condition of entire non-intercourse, of a pacific character, between the two opposing sections, except such as should be authorized by the President "for the public interest." What is the necessary effect of this condition? It is the same as when war exists between independent nations.

All existing contracts between citizens of the different sections are suspended. This from necessity, because the act for-

bids all intercourse, and intercourse is essential in order to fulfill, or perform, or enforce contracts. The courts of the [384] one section are shut by act of Congress, to the people of the other, for the citizens of the insurrectionary States are forbidden to come into the other States, or hold any intercourse with their people; and without this suits cannot be instituted or carried on, and the same is true as to citizens of the loyal States.

It is manifest from the foregoing that the complainant, was he never so loyally disposed toward the Union, had, by reason of his domicil in a State declared to be in insurrection, no right to institute or maintain, during the war, a suit in the courts of the United States, or of Kansas, for the recovery of his debt against the respondent. In a proceeding of this nature, the courts cannot, under the Act of July 13, 1861, inquire whether the particular plaintiff was loyal to the Union, or aided the rebellion; for, if he was a citizen of a rebellious State, he is regarded as an enemy, irrespective of his personal sentiments, sympathies, or acts. (*Mrs. Alexander's Cotton*, 2 Wall. 404; *The Venus*, 8 Cranch, 253; *The Indian Chief*, 3 Rob. Adm. 12; *The Friendship*, 4 Wheat. 105.) We may observe that it has been accordingly held by courts and judges of great respectability, that citizens of rebellious States could not, during the recent war, maintain suits in the courts of other portions of the United States. (*Norris v. Doniphan*, 4 Met. (Ky.) 385; U. S. circuit court for Missouri, 3 Am. Law Reg. (N. S.), 735, by TREAT, J., in *United States v. One Hundred Barrels etc.*; *Semmes v. Insurance Company*, 6 Blatchf. 455; *Life Insurance Company v. Hall*, 7 Am. Law Reg. (N. S.) 606; *Jackson v. Aetna Insurance Company*, 2 Am. Law Reg. (O. S.) 374.)

Whether we apply to the question before us the legislation of Congress, or the general rule of the public law, the conclusion is the same, viz.: That, during the war, the complainant was, as a necessary consequence of it, disabled to institute or maintain the present suit, and was so by reason of his citizenship, or domicil alone, though ever so friendly to the [385] government of the United States. It seems to follow, from these considerations, that the rule settled by the supreme court in *Hanger v. Abbott*, is equally applicable, whether the creditor who brings suit was, during the war, a citizen of a State which

engaged in the rebellion, or of a State which adhered to the Union, and, in either case, the period covered by the war, during which the inability to sue continued, is not to be included in the computation of the time within which actions are, by the Statute of Limitations, required to be brought.

If the case just referred to be examined, it will be seen to rest on reasoning which makes it applicable to all creditors unable to sue, irrespective of their citizenship or domicile.

The principle of that case was adhered to and applied, in the subsequent case of *The Protector*, 9 Wall. 687, which holds that the period during which the war continued is not to be included in the computation of the five years' time allowed by the judiciary act for bringing writs of error; but, in this case, also, the creditor was a resident of a State which did not engage in the rebellion.

The decisions of other courts tend to support the correctness of the views above expressed. To some of these we will now briefly refer. In *Semmes v. Ins. Co.* 8 Am. Law Reg. (N. S.) 673, the United States circuit court for Connecticut held that the rebellion had the effect to suspend the right of a citizen of Mississippi to sue on a policy issued by a Connecticut Insurance Company, and that the time when the right to sue was suspended, should be excluded from the computation of the limitation period.

So, in the fourth circuit, it has been decided in a case where a Tennessee corporation owed a bill of exchange, which matured before the war, against a Maryland debtor, that the conflict was a civil war, and imposed upon both parties the usual consequences of public wars, among which was the suspension of the right to sue, and as a consequence of this, a suspension of the Statute of Limitations. (*Jackson* ^[286] *Insurance Company v. Stewart*, 6 Am. Law Reg. (N. S.) 732.) Judge Redfield, in a note to the case last cited, adds his approval of the doctrine it holds, saying: "Since the late civil conflict practically interrupted all intercourse and all commerce between the different sections, we see no ground upon which, as respects the Statute of Limitations, any distinction should be made between this and international wars, so long as there existed an actual non-intercourse, and a practical impossibility of enforcing the claim." It may be added,

as we have before shown, that by the act of Congress and the action of the President, the war not only practically but legally interrupted all intercourse, and that it not only created a practical but a legal impossibility of enforcing, during its continuance, the collection of debts.

The principle that the effect of war is to suspend the running of the Statute of Limitations, has been held by other courts. (*Wall v. Robson*, 2 Nott & McC. 498; see, also, *Ogden v. Blacklege*, 2 Cranch, 272; *Hopkirk v. Bell*, 3 Cranch, 454; 1 Am. Lead. Cas. 528, and cases cited; *Bigler v. Waller*, U. S. circuit court for Virginia, Chicago Legal News, vol. 3, 26, opinion per Chase, C. J.)

And this point must be noticed: The debt to the complainant accrued May 29, 1861. The respondent claims that the war had not then commenced, and did not, in law, commence until the President's proclamation of the 16th of August, 1861, declaring Virginia in a State of insurrection, and therefore, the statute began to run against the debt before the war, and, if so, continues to run, notwithstanding the subsequent disability to sue. The views of a majority of the judges in the *Prize Cases* would perhaps authorize us to hold that the war existed before the August proclamation, and before the bond in suit matured. But we do not place our decision upon this ground, but upon the ground that even if the Statute of Limitations did begin to run, the effect of the Act of July 13, 1861, and of the proclamation of August 16, 1861, was to suspend its operation. Where a statute continues to ^[387] run, notwithstanding a subsequent disability, it is in cases where it is not unlawful to bring suit, and, perhaps, in cases only where it is possible to sue, as in the case of an infant or married woman, by next friend. The rule does not apply to the disability occasioned by a state of war. In *Hanger v. Abbott*, the plaintiff's debt accrued before the war, and yet, the period covered by the war was deducted. So, also, in *The Jackson Ins. Co. v. Stewart*, *Semmes v. Insurance Company*, and *Wall v. Robson*, before cited. And so, also, in *The Protector*, *supra*, the statute had begun to run before the war commenced, and yet, the period occupied by the war was not included in computing the time allowed to take an appeal. In this connection, it is proper to answer an argument strenuously insisted

upon by the respondent's counsel, viz., that courts cannot add to the exceptions of the statutes. Ordinarily, it is undoubtedly true, that courts cannot put into the Statutes of Limitations exceptions which the legislature has not seen fit to adopt, or has omitted to put there. It is a sufficient answer to this objection, to say that the laws of war, especially those enacted by Congress, are the paramount law, and, by suspending the right of action, they suspend also the running of the statute. This seems to be the view of the court in *Hanger v. Abbott*, 6 Wall. 532, 541, 542.

Counsel have made no reference to the Act of Congress of June 11, 1864 (13 U. S. Stats. 123). We have, nevertheless, considered its bearing upon the question now under consideration. If it be admitted that it was intended by this act to refer to other limitation laws besides those which had been enacted by Congress, and that it was competent for Congress thus to do; and if it be further admitted that in its passage Congress had in mind the case of citizens of loyal States who were creditors of citizens of disloyal States, still there is nothing in it which expressly or by any fair implication undertakes to furnish or declare a rule for any other than the cases mentioned, or for such a case as the one at bar. The ^[see] result is that it is the opinion of the court that the Statute of Limitations is not available to the respondents as a bar to the complainant's bill. We proceed next to consider the other defenses made by the respondents. The time devoted to the preceding discussions will induce us to dispose of the remaining questions, though important, with all practicable brevity.

Contemporaneously with the execution of the bond and mortgage in suit, the respondent, as collateral security, delivered to the complainant a note and mortgage made by Kenyon, and assigned to him a judgment against Perkins. The respondent claims that these have been lost to him by reason of the fault or neglect of the complainant. Different considerations apply to these two securities, and they will be considered separately.

1. *As to the Perkins judgment.* This was assigned on the record to the complainant, but we find it to be the understanding of the parties, that whatever was necessary to be done to collect or prevent loss on the securities, was to be looked after by the respondent,

who lived near his debtors, and not by the complainant, who lived in Virginia. Accordingly, the respondent caused a sale of the property which secured the Perkins judgment to be made thereunder. His attorney did the business; he paid the costs, or agreed to, and he directed the sale to be made to the complainant. Afterwards the property was swept away from both the complainant and the respondent by a prior mortgage. For this the complainant is without blame and without liability. We perceive no ground whatever, in the proof, on which to hold the complainant chargeable with the amount of the Perkins' judgment, or the amount for which the property was bid off in his name. It was all the doings of the respondent. The property was lost because the mortgage from Perkins to the respondent was defectively acknowledged. This is the respondent's misfortune, certainly not the fault of the complainant.

2. *As to the Kenyon note and mortgage.* In 1862 the [289] respondent went to the United States district attorney for Kansas, and informed him that he owed the complainant the amount of \$2,400 on bond and mortgage; said it was liable to confiscation, and that he would rather pay the government than Brown. The attorney commenced proper proceedings to confiscate this bond, but they were dismissed because the respondent claimed and produced a letter purporting to be from Brown, showing that the bond was to be cancelled in consideration of the Perkins judgment and the Kenyon note. After this proceeding was dismissed, the attorney for the government commenced a new proceeding, in 1863, to confiscate the Kenyon note, as the property of, or as a credit belonging to, the complainant. The record of that proceeding shows that an information was filed in the United States district court for Kansas, on the 10th day of September, A. D. 1863, on behalf of the United States, against the Kenyon note and mortgage, properly describing them, and the assignment to Brown. Kenyon was notified to show cause why he should not pay to the United States. A warrant and citation issued, commanding the marshal "to attach the said note and mortgage and credits, and all the interests therein belonging to said Edward S. Brown." The marshal returned on the warrant that he had attached, as the property and credit of the said Brown, the Kenyon note,

and had notified Hiatt, Kenyon, and all other persons having any right, title, or interest therein to appear as commanded, and that he had also published notice of the seizure, etc., in a newspaper, and posted the same on the court-house door. At the November term, 1863, such proceedings were had that the court entered a decree condemning the note as forfeited to the United States, and ordering Kenyon to pay the same to the clerk of the court, and in default thereof, ordering a sale of the mortgaged property. Under this decree one half of the mortgaged estate was sold on a writ of execution, by the marshal, in July, 1864, for \$542.76, to one Powell, and the money received from him by the marshal. In March, 1865, on an *alias* writ, the marshal [300] sold the residue of the property to one George for \$668, and received from him the amount of his bid.

The proceedings on behalf of the United States against the Kenyon note and mortgage were taken under the Act of Congress of July 17, 1862 (12 U. S. Stats. 589). A libel of information was regularly exhibited, a warrant or writ of monition issued, and was returned by the marshal that he had attached the property as commanded. The proceedings are not void on their face, and the complainant under that act had an interest in this note and mortgage which, if he were guilty of the acts charged, would make it liable to condemnation. It may be that he was not guilty of any act which would authorize the decree of condemnation, and it may be that the decree is in some respects irregular or defective, but apparently it is not void; and there is no evidence that it has ever been reversed or set aside; and the present is not a suit to impeach it or have it set aside, or otherwise directly to attack it. It is by no means very fully or satisfactorily shown by the complainant that his relations to the rebellion were such as that his property or interest in the Kenyon note was not liable to condemnation.

To avoid the effect of the decree of condemnation, the complainant should have clearly shown his status during the war; that he had done no act which subjected his property to be seized and confiscated; and also that this unjust decree was brought about by the fraud of the respondent.

If these facts were shown, then in adjusting the rights of the

two parties we would not allow the respondent to take any advantage of his own fraudulent acts. But these facts have not been satisfactorily established, and the complainant, in stating the account between the parties, will be charged with the full amount of the Kenyon note.

It may be said that the evidence in this suit shows that the Kenyon note was, during the whole war, in Brown's possession, and hence the marshal's return that he had attached it cannot be true. (See *Pelham v. Rose*, 9 Wall. 103.) If untrue, ^[1891] it may be that he would be liable for a false return; at all events, the decree pronounced cannot be collaterally assailed.

There is some conflict of opinion as to whether interest should be allowed during the war. That it should be, see opinion of Chase, C. J., in *Shortridge v. Macon*, 1 Abb. U. S. 58; but the same distinguished judge, under circumstances, afterwards disallowed it in *Bigler v. Waller*, *supra*. That it should not be allowed because the debtor is prohibited from paying, see *Tucker v. Watson*, Am. Law Reg. February, 1867, and cases cited; 1 Am. Lead. Cases, 528, and authorities cited. Without now undertaking to discuss or decide which is the true rule, there are special circumstances in the case at bar not necessary to be enumerated, which induce the court to consider it most equitable to direct the disallowance of interest during the war.

In *Ward v. Smith*, 7 Wall. 452, it was held that under the circumstances interest did not cease, but Mr. Chief Justice Chase says: "The opinion of the court was put upon circumstances creating an exception to the general rule, that interest does not accrue during war between citizens or subjects of belligerent States; the general rule was neither affirmed nor denied." (*Bigler v. Waller*, *supra*.) In computing interest, the time between April 19, 1861, and May 26, 1865, will, as in the case last cited, be excluded.

Let a decree be drawn up in conformity with this opinion.

DELAHAY, J., concurs.

Decree accordingly.

[NOTE.—In the circuit court of the United States for the eastern district of Arkansas at the April term, 1871 (present DILLON, J., and CALDWELL, J.), it was held that the rebellion did not end in the State of Arkansas so as to revive the

operation of the Statute of Limitations until the proclamation of the President of April 2, 1866. As to Statute of Limitations, see also *Levy v. Stewart*, 11 Wall. 244, decided since the foregoing opinion was delivered.

As to point ruled under the confiscation act, see *Miller's Executors v. United States*, 11 Wall. 268, and *Tyler v. Defrees*, 11 Wall. 331, decided by the supreme court, December term, 1870. Following these cases and the [392] decision in *Brown v. Hiatt*, the circuit court of the United States for the district of Kansas, at the May term, 1871 (present MILLER, J., and DILLON, J.), in *Brown v. Kennedy*, held that other similar confiscation proceedings against Brown, where there was a return of seizure and notice to the debtor were not void, and would protect such debtors from subsequent repayment to Brown of the moneys paid into the district court under the confiscation decree.]

On Appeal the supreme court affirmed the principles of law laid down in the foregoing opinion, except that portion which disallowed the complainant interest between April 27, 1861, and April 2, 1866, on which point the decree was reversed, and the circuit court directed to enter a decree allowing interest to the complainant. — 15 Wall. 177.

SPRATLEY v. HARTFORD INS. CO.

PARTIES — REAL PARTY IN INTEREST. — An order on an insurance company, given by the assured, after the loss, to a creditor, directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order the assignee of the cause of action and the real party in interest.

INSURANCE POLICY — PROOF OF LOSS. — On a plea that proofs were not furnished as required by an insurance policy, plaintiff may show that partially defective proofs were accepted by the company, such acceptance being inferred from failure of the company to object to the same.

ID. — CONSTRUCTION OF POLICY — PROPERTY COVERED BY. — A policy describing "blacksmith and carriage maker's stock, manufactured and in process of manufacture," embraces unmanufactured or raw stock of the kind mentioned.

THIS is an action at law on a fire insurance policy, tried before DILLON, J., and DELAHAY, J., and a jury.

Mr. McCahon, and *Mr. Fenlon*, for the Plaintiff.

Mr. Wheat, for the Defendant.

DILLON, *Circuit Judge*. — The court rules the following points: —

1. *Parties — Real parties in interest.* Where a statute of the State, applicable by express adoption to the practice in the federal court sitting therein, requires that actions shall be brought by "the real party in interest," an order on an insurance company, given by the assured to a creditor of his, *after* the loss,

directing the company to pay such creditor the *whole* amount due under the policy, makes the person receiving such order an assignee of the cause of action, and entitles him, under the statute above mentioned, to sue on the policy for the loss in his own name. (Distinguished from *Thompson v. Railroad Companies*, 6 Wall. 134.)

2. *Acceptance of defective proofs of loss.* Where, in an action on an insurance policy, issue is taken upon a plea setting up that the proofs of loss were not furnished as required by the policy, the plaintiff may show that proofs, in some ^[303] respects defective, *were accepted* by the company as sufficient, and such acceptance may be inferred from the failure of the company to object to the proofs, and its placing its refusal to pay upon other grounds.

3. *Construction of policy as to property covered by it.* A policy describing the property insured as "blacksmith and carriage makers' stock, manufactured and in process of manufacture, contained in a certain building," embraces *unmanufactured or raw stock* of the kind mentioned in the policy.

Note. *Assignee of Amount Due on Insurance Policy* is real party in interest.—Followed, *Board of Commissioners v. Jameson*, 86 Ind. 165.

PACIFIC RAILROAD COMPANY v. LEAVENWORTH CITY.

MUNICIPAL CONTROL OVER STREETS.—Under the statutes of Kansas a railroad company is forbidden to construct and operate its roads upon the streets of an incorporated city "without the assent of the corporate authorities."

STREETS—USE BY RAILROAD COMPANY—CONDITIONS.—Under this statute the city authorities are not limited to a simple granting or denial of the right of way, but they may prescribe conditions on which they will give their assent, and if these are lawful and proper and are accepted by the railroad company, they are binding upon the parties.

Id.—Accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of the city, and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made.

Id.—**REMEDY OF MUNICIPALITY.**—An ordinance and contract, special in their terms, construed to give the city a right to re-enter and take possession of the street, and remove the railroad track on the failure of the company to comply with the conditions of the ordinance granting to it the right of way.

LD.—INJUNCTION.—The principles, which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company, considered.

Before DILLON, C. J., at Chambers.

[394] *On motion for an injunction.* The complainant, the Pacific Railroad Company (of Missouri) is a corporation chartered by the State of Missouri, and it built and is operating a road from St. Louis to the Kansas State line. By virtue of its charter it leased the road of the Missouri River Railroad Company, extending from the State line of Kansas to the city of Leavenworth, and it likewise leased on the 28th day of September, 1870, the road of the *Leavenworth, Atchison & Northwestern Railroad Company*, extending from Leavenworth to Atchison, in Kansas. Substantially, the present controversy is between the complainant (the Pacific Railroad Company of Missouri) and the city of Leavenworth, and relates to the rights of the parties under the ordinances and contracts hereinafter mentioned. By the statutes of Kansas, it is provided that the assent of the corporate authorities of cities is necessary before a railroad company is authorized to lay down its track and operate its road in the streets of a city. (Gen. Stats. Kansas, 202.) With this statute in force, the city of Leavenworth, on the 13th day of January, 1869, passed an ordinance granting the right of way to the said *Leavenworth, Atchison & Northwestern Railroad Company* through the city upon the public streets, or ways thereof (along Water Street and the levee), “upon the condition and restrictions” in the ordinance set forth. Among these conditions one was, that the said railroad company should construct and maintain, between certain streets named, and within a specified time (one year), “all of the freight and passenger depots used and required for the transaction of the business of said company in said city.” The character of the buildings thus to be erected is particularly described. Among these conditions, also, was one that the “railroad company shall, within one year, under the direction of the city engineer, grade, rip-rap, and pave the levee, and that the said levee shall be so completed as to form a uniform and straight line from, etc., to [395] etc., and provided, further, that where it is necessary to remove the

present rock levee for the purpose of laying their track, the company shall repave the same in as good condition as before they removed it."

The ordinance provides that it shall not take effect so as to confer the right of way until a contract is executed between the company and city, binding the former to keep and observe the requirements of the ordinance; which contract, it may be mentioned, was subsequently duly entered into and signed by the respective parties. The ordinance contains this provision as to the rights of the city, in case the company fails to comply with its agreement, to wit: "*Provided, that if the said railroad company shall fail to perform either of the above specifications and agreements, the right of way hereby granted shall cease, and the city of Leavenworth shall have the right to re-enter and take possession of all the public grounds of the city over which the said company shall have constructed its road by virtue of this grant.*"

Subsequently, the city twice extended the time for completing the work required of the company, but reserving otherwise all of its rights. It is admitted that the extended time has expired, and that the company has not yet erected any depot buildings, nor commenced their erection; nor has the company finished the work on the levee required to be done by the ordinance and contract; but it is alleged and shown that it entered upon its performance and has expended therein about thirty thousand dollars. In the lease of the Leavenworth, Atchison & Northwestern Railroad to the complainant, no reference is made to the ordinance and contract with the city of Leavenworth, nor is there any assumption by the complainant of the duties and obligations of the lessee in the premises.

After the passage of the original ordinance, and the making of the contract in conformity therewith, the company laid down its track on Water Street as authorized by the ordinance, and continued to use the same until its road was ^[294] leased to the complainant, and after that the complainant continued to use the same until forcibly prevented by the city, on or about December 30, 1870.

On the 23d day of December, 1870, the city council of Leavenworth passed an ordinance reciting the former ordinance of January 13, 1869, granting the right of way to the Leaven-

worth, Atchison & Northwestern Railroad Company on certain terms, and the failure of the company to comply therewith, and enacting that the city elects to consider all of said contracts rescinded and at an end, and declares the right of way therein granted to have ceased, and that the city elects to re-enter and resume possession of all the public grounds over which the road of the company is constructed. The marshal of the city is ordered to re-enter and take possession accordingly, and notify the company thereof.

The city marshal, by the resolution of the council passed December 30, 1870, was instructed "to maintain the rights of the city at all hazards, and with such force as may be necessary, and that if the railroad company, or any person shall run, or move, or offer to run or move any car or engine on or over the said levee, Water Street, or public grounds of the city, to remove so much of the railroad track as may be necessary to prevent it."

These orders the marshal obeyed, and took possession of the said grounds, and removed portions of the track, and by reason of such possession, forcibly taken and held, prevents the complainant from operating said road through the city, and no trains have run through the city, or to Atchison since that time. The bill sets forth the above facts, and that the damage thereby caused is irreparable, stating the facts showing it to be so.

The bill alleges no excuse for the company's failure to perform the agreements respecting the depot buildings, and levee, except that it charges that the city had no lawful power to require the company to erect depot buildings, and the company had no lawful power to agree to grade, rip-rap, and pave the levee.

[397] The bill makes the said Leavenworth, Atchison & Northwestern Railroad Company, as well as the city of Leavenworth, defendants, and prays for an injunction to prevent the city, or its officers, from interfering with the use of the railroad track through the city by the complainant, and for general relief.

On the bill and exhibits and certain affidavits, the complainants moved the circuit judge, at his chambers, on the 9th day of January, 1871, for the allowance of a temporary injunction; and it was upon this motion that the subjoined opinion was given.

Crozier, Stillings, Hurd & Fenlon, for the Complainants.

McCahon & Moore for the City.

DILLON, *Circuit Judge*.—This is an application by the Pacific Railroad of Missouri for a temporary injunction against the city of Leavenworth to prevent it from interfering with the complainant's use within the city, of the track of the Leavenworth, Atchison & Northwestern Railroad Company, of which latter company the complainant is the lessee.

The *legal* rights of the complainant to the use of the streets of the city, are wholly derived from the Leavenworth Atchison & Northwestern Railroad Company, and can mount no higher than their source. The rights are derived from the ordinances and contracts referred to in the statement of the case.

By a statute of the State of Kansas it is enacted that "Every railway corporation may construct its road across, along, or upon . . . any street, highway, etc., but the company shall restore the same to its former State, etc. *Nothing herein contained shall be construed to authorize the construction of any railroad not already located, in, upon, or across any street in any city incorporate or town without the assent of the corporate authorities of such city.*" (Gen. Stats. Kansas, 1868, p. 202, tit. Corporation, § 47.) This statute went into ^[398] effect November 1, 1868, before the location of the Leavenworth, Atchison & Northwestern Railroad, and it was in force at the time when the ordinance of January 13, 1869, was enacted, and remains unrepealed. The city of Leavenworth is incorporated as a city of the first class. It is unnecessary to inquire what would be the respective rights of the railroad company, and of the city, if this statute were not in force, or did not apply to them.

The power of the legislature over private corporations (§ 1, art. xii., of the Constitution of Kansas) and over all public or municipal corporations, and over the uses to which public streets and highways may be devoted, is such that it cannot be doubted that it was entirely competent for it to enact that the company should not construct its road in the streets of an incorporated city, without the assent of its authorities. (*City of Clinton v. Railroad Company*, 24 Iowa, 455; *People v. Kerr*, 27 N. Y.

188; *Commonw. v. Erie Railroad Co.* 27 Pa. St. 339, 354; *Moses v. Railroad Co.* 21 Ill. 516; *Inhab. etc. v. Railroad*, 4 Cush. 63.)

The legislature of Kansas did so enact in the words above quoted; and under that statute no railroad company could construct its road upon the streets of Leavenworth "without the assent of the corporate authorities thereof."

It has been argued in behalf of the complainant that this statute simply clothes the city with the power to say "yea" or "nay," but that it does not authorize it to stipulate for terms or conditions. But in this view I cannot concur. Its power is complete; and it was undoubtedly the design of the legislature that the city authorities, as the representatives and guardians of the public interests of the city and its inhabitants, should have the power to prescribe, as conditions of giving their assent, such lawful and proper terms as they deemed expedient. (In point, see *Railroad Company v. Baltimore*, 21 Md. 93.)

In the exercise of this authority the city said to the company, you may construct your road along Water ^[see] Street, upon, *inter alia*, two conditions: 1. You shall, within a given time, build depot buildings, of a given character, and at a specified place. 2. You shall also grade, rip-rap, and pave the levee (which is part of Water Street, and on and along which the right of way is granted.) To this the company agreed, not only by accepting of the grant of the right of way on these conditions, but by executing a contract to this effect.

It is now insisted by the company that the city has no lawful power to contract for the erection of depot buildings, and hence so much of the ordinance and contract as relates to this subject is *in excess* of its authority, and void. My opinion is otherwise; and it is strengthened by an examination of the extensive powers with which it has been the policy of Kansas to clothe its municipal corporations. (Gen. Stats. Kan. 1868, ch. 18, art. i. p. 129; Gen. Stats. Kan. 1860, 163, pl. 25.) It is also objected by the complainant that the railroad company had no authority to agree to grade, rip-rap, and pave the streets of a city, and that its agreement to do so in this instance is *ultra vires* and void. (39 Eng. Law & Eq. 28, 37; 30 Eng. Law & Eq. 120.) In the case now before me, the work which the company agreed to do in consideration of the right of way

granted seems to be upon or connected with the street occupied, and there is nothing in the record to show that more was required of the company than was reasonable under the circumstances, and nothing to show that the company would not be benefited as well as the city by the making of the required improvements. If the use of a street by a company by reason of the grade adopted, or other peculiarities of situation, would cause an expenditure of money by the city to put the street in repair or fit it for use, it would seem to be competent for the city to make the grant of the right of way conditioned on the payment of so much money. If so, may it not require, as the condition of giving its assent, that work of such a character and to such an amount shall be done upon the street, and if the company agree to do this, and accept the grant accordingly, may it ^[400] keep and enjoy the grant, and be heard to say that its agreements, in consideration thereof, are *ultra vires*? I think not.

For the purposes of this application, the ordinance of January 13, 1869, and the contract executed in pursuance thereof, must be taken to be binding upon the parties. Confessedly, this contract has not been performed by the company. It has not performed, nor even entered upon the performance of the agreement to erect depot buildings. It has only performed, in part, its agreement in respect to the street. The bill as now framed sets forth no excuse for the non-performance, and does not aver a readiness or even an intention hereafter to perform the contract. On the contrary, the complainant says that as between it and its lessor, it is the duty of the latter to perform this contract, and to maintain it in the possession and use of the road; but with this dispute the city has, as I conceive, no concern. The company, then, not having kept the contract with the city, and setting forth no equitable excuse for the failure, was the city authorized to take possession of the street, and prevent the further use of it by the company? Upon this point my opinion is with the city. This opinion rests upon a construction of the ordinance which granted the right of way. It seems to have been very carefully drawn. It is impossible to read the ordinance and its various amendments without perceiving that the city feared, or at least contemplated, a failure

on the part of the company to keep its engagements, and in that event provided a remedy, to which the company agreed. This was that "the right of way hereby granted shall cease, and the city shall have the right to re-enter and take possession," etc. In re-entering and taking possession the city has done nothing but that which the company agreed it might do in the contingency of a failure to perform its agreement.

Whether the things to be performed by the company are *conditions* subsequent, as claimed by the city, or mere *covenants*, as contended by the company, it is not perhaps material, on this application, to decide. This depends upon the intention. ^[401] (4 Kent Com. 135, 136.) And although courts incline against conditions, they will or should carry out the intention of the parties; and my opinion is that the parties here intended that the city should have the right to take possession on the failure of the company to keep its contract.

It has been strenuously maintained by the counsel for the city that its marshal having removed the track of the company and taken possession of the street, the injury complained of is consummated a *fait accompli*—and that it is not the province of an injunction to command a party to undo what is already done. (*Wagnelin v. Goe*, 50 Ill. 459, and authorities cited and reviewed.) But this is a different case from the one cited, and depends upon different principles. I refuse the injunction not on this ground, but on the ground that the company is in default and the city is only pursuing a remedy which is given to it by the contract of the parties.

But were the city in the wrong and the company not, and the former had, without right, interfered with the operation of a long and important line of railroad, causing a break as shown of about three miles, which has resulted in stopping the operation of the road to the north, there can be no doubt but that it would be a case where nothing but an injunction would be adequate to protect the rights of the company and those of the public. The injunction would not issue to command the city to restore the rails it had removed, but to restrain it and its servants from further interference with the company in the use of the right of way granted to it by the city. Upon the case made, the injunction asked must be denied.

Injunction denied.

Subsequently, upon representations that the complainant would adapt its bill to the views above expressed; that it was suffering irreparable damage by the break in its line, and the public great inconvenience; that the use of the street by the company pending the litigation would occasion no considerable, if any actual, injury to the city, or inconvenience to ^[402] its inhabitants; that it was willing to give the most ample security to the city to abide the result of the suit, etc.,—the following order, in substance, was made as expressing the conditions on which a temporary injunction would be allowed. This order proceeds, it will be observed, upon the idea that the contract is binding, but that a court of equity, in view of part performance by the company, the fact that the complainant was an assignee and not in actual default, and of the public interests involved, would or might have the right to relieve against the forfeiture the city seemed to be enforcing. It was stated by counsel for the city that its purpose was not to stop the operating of the road through the city, but to compel the company to comply with its contract.

Ordered, that if the complainant will amend its bill so as to admit the obligation to comply with the ordinance and contract, and will give security in the sum of fifty thousand dollars that it or its lessor will at once enter upon the work of erecting the depot buildings and completing the work on the levee and street with reasonable dispatch, and abide all the orders and the final decree of the court that an injunction will be allowed to restrain the city, until further order, from all interference with the complainant in the use of the right of way granted by the ordinance.

Ordered accordingly.

[NOTE. — The legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power or devolve it upon the local or municipal authorities. (*Mercer v. Railroad Company*, 36 Pa. St. 99; *Moses v. Railroad Co.* 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Railroad Co. v. Municipality*, 1 La. An. 128; 9 La. An. 284; *Geigor v. Filor*, 8 Fla. 825; *Springfield v. Railroad Co.* 4 Cush. 63; *Tute v. Railroad Co.* 7 Ind. 479; see *Railroad Co. v. Daily*, 13 Ind. 853; S. C. 13 Ind. 551; *People v. Kerr*, 27 N. Y. 188; *City of Clinton v. Railroad Co.* 24 Iowa, 455; *Lackland v. Railroad Co.* 31 Mo. 180.)

But where the public have only an easement in the street or highway, it has been often, but not always, held that against the proprietor of the soil the use of the street or highway for the purposes of a railroad is an additional burden or servitude, of

which, under the constitution, he cannot be deprived without compensation. (*Mahin v. Railroad Co.* 24 N. Y. 658; [403] *Carpenter v. Railroad Co.* 24 N. Y. 655; *Gray v. Railroad Co.* 13 Minn. 315; *Williams v. Plankroad Co.* 21 Mo. 580; *Ford v. Railroad Co.* 14 Wis. 616.) And this, says Judge Cooley, appears to be the weight of judicial authority. (Const. Lim. 549.) A different rule has been applied where the fee of streets is in the city corporation and not in the adjoining owner. (See *Railroad Co. v. Applegate*, 8 Dana, 28; *Williams v. Railroad Co.* 16 N. Y. 97, *obiter*; *Wager v. Railroad Co.* 55 N. Y. 526; note observations, p. 533; *City of Clinton v. Railroad Co.* *supra*; *People v. Kerr*, *supra*; *Protzman v. Railroad Co.* 9 Ind. 467; 13 Ind. 358, *supra*; *Moses v. Railroad Co.* 21 Ill. 522; see Cooley, Const. Lim. 555, 556, and notes.)

In the absence of special restriction there is much to recommend the doctrine of the plenary power of the legislature over all streets and highways and public places, and their uses, which is asserted in the Pennsylvania cases, the leading one of which is the *Philadelphia etc. Railroad Co.*, 6 Whart. 25; affirmed, 27 Pa. St. 339, 354; criticised, *Williams v. Railroad Co.* 16 N. Y. 97, 106; see, also, *O'Connor v. Pittsburg*, 18 Pa. St. 187, 189; *Commonwealth v. Passmore*, 1 Serg. & B. 217; approved, *Chicago v. Robbins*, 2 Black, 423.

Remedy by injunction by and against city corporation: *City of Clinton v. Railroad Co.* 24 Iowa, 455; S. U. 24 Iowa, 482, note; *Railroad Co. v. Baltimore*, 21 Md. 93; *Morris etc. Railroad Co. v. Newark*, 2 Stockt. Ch. 352.]

Municipalities having Power to Grant or Refuse right of way to railroad company, may grant the right conditionally.—Followed, *Union Pac. R. R. Co. v. Merrick Co.* 3 Dill. 363; *Phila. etc. R. R. Co. v. Philadelphia*, 11 Phila. 362.

TERRY v. LIFE INSURANCE COMPANY.

LIFE INSURANCE — SELF-DESTRUCTION — EFFECT OF INSANITY.—Insanity on the part of the assured which irresistibly impelled him to take his own life, or existing to such an extent as to render him incapable of forming a rational judgment with respect to the act of self-destruction, will so far excuse him as to render the company liable, notwithstanding the policy contains a condition avoiding liability thereon, in case the assured shall “die by his own hand.”

INSANITY — BURDEN OF PROOF.—The burden of proof to establish the insanity is, in such cases, upon the plaintiff, by whom it is alleged.

SELF-DESTRUCTION — PRESUMPTION FROM INSANITY.—There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity.

Before MILLER, J., and DILLON, J.

THIS is an action on a life insurance policy issued by the defendant to the husband of the plaintiff. The policy contained [404] a condition avoiding liability thereon in case the assured shall “die by his own hand.” Answer: that the assured died from poison, which he took for the purpose of destroying his life. Replication: that he was insane at the time and with respect to the act in question. Trial to jury, before MR. JUSTICE MILLER, and DILLON, Circuit Judge.

The fact that the deceased died from poison, self-administered, was admitted on the trial, and the only question was in respect to the alleged insanity. The testimony showed that the deceased had been in great trouble in consequence of rumors respecting his wife's fidelity; that he was in a highly excited and distressed state of mind; that in communicating his suspicions to friends he would at times break out in explosions of laughter without apparent cause; that he purchased arsenic, stating that he wished it to kill mice, but inquired whether there was enough to kill a man. Some medical gentlemen gave their opinion to the jury that he was insane. There was no evidence offered by either party touching the conduct of the wife, or the ground or reasonableness of the suspicions of the deceased as to her character.

Mr. Nevison, for the Plaintiff, contended for the doctrine laid down in *Eastabrook v. Ins. Co.* 54 Me. 224; *Breasted v. Ins. Co.* 4 Seld. 299; S. C. 4 Hill, 73; 1 Phillips Ins. 503; *State v. Felter*, 25 Iowa, 67.

Mr. Shannon, for the Defendant, referred to *Dean v. Ins. Co.* 4 Allen, 96, and asked the court to instruct accordingly.

After consideration, the court, by the presiding justice, charged the jury as follows:—

MR. JUSTICE MILLER.—It being agreed that deceased destroyed his life by taking poison, it is claimed by defendants that he “died by his own hand,” within the meaning of the policy, and that they are therefore not liable. This is so far true, that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the [405] poison, as will relieve the act of taking his own life from the effect, which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was

committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other, there is no presumption of law, *prima facie*, or otherwise, that self-destruction arises from insanity; and if you believe, from the evidence, that the deceased, although excited, or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.

The jury found for the plaintiff, and there was judgment accordingly.

[NOTE. — Under a policy with a condition making it void in case the assured shall die by his own hands, the company is liable if the self-destruction shall happen as a direct consequence of the insanity of the person insured. (*Breasted v. The Fur. Loan and Trust Co.* 4 Hill, 73, 1843; S. C. 8 N. Y. (4 Seld.) 299, 1853; *Eastabrook v. Union Mut. etc. Co.* 54 Me. 224, 1866; *Hartman v. Keystone Ins. Co.* 21 Pa. 86, 466, 1853 (poisoning by taking arsenic). As to the degree and nature of the insanity necessary to make the company liable, when the policy contains such a condition, the cases are conflicting. See, in addition to the above, *Dean v. Am. Mut. Life Ins. Co.* 4 Allen, 96, 1862; S. C., with note, 1 Big. Ins. Rep. 195; followed *Cooper v. Mass. etc. Ins. Co.* 102 Mass. 227, 1869; *Nimick v. Ins. Co.* (U. S. circuit court, West. Dist., Pa., McKennan, J., 1870) 1 Big. Ins. Rep. 689; *St. Louis Ins. Co. v. Graves*, 6 Bush, 268; [406] S. C. 1 Bing. Ins. Rep. 736, as to effect of moral insanity. The leading British decisions on the subject are *Borraidale v. Hunter*, 5 Man. & G. 639, 1843; *Clift v. Schwabe*, 3 Man. & G. 437, 1846; 2 Car. & K. 134; *Defaur v. Ins. Co.* 25 Beav. 603, 1858; *Horn v. Ins. Co.* 7 Jur. N. S. 673; *White v. British etc. Ass. Co.* 7 Law R. Eq. Cas. 894.)

Sanity of a person who commits suicide presumed. *Arguendo*, per Williams, C. J., in *St. Louis Ins. Co. v. Graves*, *supra*; *contra*, Robertson, J., in *St. Louis Ins. Co. v. Graves*, *supra*.

The court examined the foregoing authorities before adopting the charge to the jury in the foregoing case.]

Self-Destruction Raises no Presumption of insanity.—Followed, *Wolff v. Connecticut Mut. L. I. Co.* 2 Flap. 358.

Judgment affirmed on appeal, 15 Wall. 580.

UNITED STATES v. VAN FOSSEN ET AL.

RECOGNIZANCE—EFFECT OF SUBSEQUENT IMPRISONMENT OF PRINCIPAL COGNIZOR BY STATE AUTHORITY.—It is no defense to sureties on a recognizance given to the United States in a criminal case, that their principal, after entering into the recognizance, and before the time fixed for his appearance in the United States court, went beyond the jurisdiction of the district, into another State, and there committed an offense against its laws, or was there arrested for a prior offense against its laws, in punishment for which he was, at the time the recognizance was declared forfeited, in actual confinement in the penitentiary of such State.

ID.—EFFECT OF SUBSEQUENT IMPRISONMENT BY UNITED STATES.—Whether, in such case, the sureties would have been exonerated had the subsequent arrest and confinement been by the United States—*quere?*

ID.—EFFECT OF DEATH OF PRINCIPAL.—Death of the principal, after default and forfeiture of his recognizance, does not exonerate his sureties.

Before DILLON, J., and DELAHAY, J.

Action on recognizance. William S. Dunn, at the October term, 1868, of the United States district court for the district of Kansas, was indicted for robbing the United States mail, and was duly arrested therefor by the marshal of the district, on the 4th of April, 1870. On the 4th day of May, 1870, Dunn, as principal, and *the present defendants, as his sureties*, executed to the United States a recognizance in the penal sum of two thousand five hundred dollars, in the usual form, conditioned that the said Dunn should “appear in his own proper person, [407] before the district court of the United States for the district of Kansas, at its next term, to be held at, etc., on the 10th day of October, 1870, and not depart therefrom without leave, etc., then this bond to be null and void, otherwise to remain in full force and effect.” Pursuant to the practice of the court, this action is brought upon the recognizance; and it is alleged in the petition that Dunn failed to appear at the term specified; that the sureties, though duly called, and required to produce him according to the tenor of the condition of the bond, failed to do so, and that thereupon the same was duly forfeited.

The sureties in the recognizance, for answer, plead in substance: “That, after they entered into it, Dunn, the principal, went beyond the jurisdiction of the United States court, into the State of Missouri; that on the 10th day of June, 1870, he committed, in Marion County, in that State, the crime of grand larceny, for which he was duly indicted and convicted by the circuit court

of Marion County, and sentenced for the term of six years to hard labor in the penitentiary of the State of Missouri, to which he was taken by the authorities of the State, to undergo his imprisonment; that he was, pursuant to said sentence, in the custody of the warden of the prison when such recognizance was forfeited; wherefore, said Dunn could not appear in his own proper person before the United States district court, as required by the recognizance; and the sureties, without any fault on their part, are thereby prevented from producing the said Dunn to answer the indictment therein pending against him." To this answer, the district attorney demurs, on the ground that the facts therein pleaded do not discharge the defendants from liability.

A. H. Horton, District Attorney, for the United States.

W. C. Webb, McComas & McKeagan, for the Defendants (sureties).

[408] *DILLON, Circuit Judge.*—Examination and reflection have confirmed my first impression that the facts pleaded in defense do not, in law, exonerate the defendants from liability on the recognizance. The recognizance is a contract between the cognizors and the government of the United States, that if the latter would release the principal cognizor from custody, the former would undertake that he should personally appear at the specified time and place to answer the indictment. The condition of the recognizance was broken by his failure to appear; and the parties to it became absolute debtors to the United States for the amount of the penalty (*The People v. Anable*, 7 Hill, 33), and must be held liable to pay the same, unless they can show some matter legally sufficient to excuse this failure.

"It is a general principle of the law," says Nelson, C. J., "that where the performance of the condition of a bond or recognizance becomes impossible by the act of God, or of the law, or of the obligee, the default is excused." (*The People v. Bartlett*, 3 Hill, 570, and authorities cited; approved and followed; *Caldwell's Case*, 14 Gratt. 698; and see also *Way v. Wright*, 5 Met. 380; *State v. Allen*, 2 Humph. 258; *Brown v.*

People, 26 Ill. 32; *The People v. Manning*, 8 Cowen, 297.) The principal cognizor was not prevented by sickness or death, or any act of God, from keeping the condition of the bond; and hence we have only to consider whether the defendants are excused of the forfeiture by the act of the law, or by the act of the obligee.

The obligee in the recognizance is the United States, whose criminal laws the principal obligor was indicted for violating. It is not alleged in the answer that the United States subsequently arrested and imprisoned him, but that this was done by the State of Missouri, a stranger to the recognizance. If it were shown that the United States had, by a subsequent arrest and conviction in another district, for another offense against it, prevented the performance of the condition, the question would be more complicated and difficult [409] of solution, and one respecting which the cases in the State courts seem to differ. (*Brown v. People*, 26 Ill. 32; *Devine v. State*, 5 Sneed, 623; *Alguire v. Commonw.* 3 Mon. B. 349; *Ingram v. State*, 27 Ala. 17, 20; compare *The People v. Bartlett*, 3 Hill, 570; *Caldwell's Case*, 14 Gratt. 698.)

The United States and the State of Missouri are wholly distinct parties, and the action of the State authorities cannot be imputed to the government of the United States as an obstruction or interruption *by it* to the performance of the condition of the recognizance. It is therefore plain that there is no act of the obligee which excuses the default of the principal obligor. Hence, the defense pleaded must rest upon the proposition that the performance was excused by the *act of the law*.

This makes it necessary to consider what is an *act of the law* in the sense of the rule.

"There is a diversity," says Brian, C. J., "where a condition becomes impossible by the act of God, as death, and where by a third person (or stranger), and where by the obligor, and where by the obligee; the first and last are sufficient excuses of forfeiture, but the second is not; for in such case the obligor has undertaken that he can rule and govern the stranger, and in the third case, it is his own act." (Vin. Abr., tit. Condition, G. c., pl. 19, quoted by Nelson, C. J., in *People v. Bartlett*, *supra*.)

A distinction is, in my opinion, to be observed between the

act of the law, proper, and the *act of the obligor*, which exposes him to the action and control of the law. The facts pleaded by the sureties show that their principal was prevented from appearing, not by an act of the law, properly viewed, but by reason of his own voluntary act, which rendered him amenable to the criminal laws of another jurisdiction. There would be no one so bold as to claim that the principal should be allowed to set up, as a defense to this recognizance, that he had thus been prevented from appearing; and the [410] sureties are so far bound up with their principal that they must show that *he* had a sufficient excuse for not keeping the condition of the bond.

The case stands thus: The United States had the actual custody of the principal, to answer an indictment which had already been preferred against him. Upon the recognizance being taken, the principal was delivered into what Blackstone calls the "friendly custody" of his sureties, instead of being committed to prison. (4 Blackst. Com. 301.) They thenceforth became invested with full authority over his person. They are his jailors. They may take him at any time or place; in the State or beyond it. They are aptly said to have the principal always upon the string, and they may pull it when they please, to surrender him in their own discharge. (6 Mod. 231.) If they do not exercise their power to prevent his going beyond the jurisdiction, and he does so, with or without their consent, and commits an offense, and is sentenced to prison for it, this cannot be accepted by the State in whose tribunals the recognizance was taken, as a defense thereto. Upon considerations such as these, it was adjudged by the supreme court of Tennessee to be no defense to sureties, that, after the recognizance was entered into, and before the forfeiture was taken, the principal was arrested in another State for an offense committed there, and, by reason of such imprisonment, disabled or prevented from keeping the conditions of the recognizance. (*Devine v. State*, 5 Sneed, 6, 23.)

This case, in principle, is like the case at bar, and may be distinguished from those where, as in *Caldwell's Case*, 14 Gratt. 698, and *The People v. Bartlett*, 3 Hill, 570, the subsequent imprisonment is by the *authority of the same State* which is

seeking to enforce the recognizance, and where it is held that the sureties were discharged by the *act of the obligee*. But this is a point on which, as before observed, the cases are conflicting, and as to which we need not express any opinion. (*Brown v. The People*, 26 Ill. 32; ^[411] *Alguire v. Commonw.* 3 Mon. B. 349; *Ingram v. State*, 27 Ala. 17; *Gingrich v. People*, 34 Ill. 448; *United States v. French*, 1 Gall. 1; *State v. Scott*, 20 Iowa, 63; *People v. Cushney*, 44 Barb. 118; *Winniger v. State*, 23 Ind. 228; *State v. Allen*, 2 Humph. 258.)

Other considerations arising out of the peculiar relations of the State and general government tend to vindicate the correctness of the view that the defense must be held insufficient. The general government and the several States have their separate criminal codes. If a person is in the actual custody of the United States for a violation of its laws, no State can, by habeas corpus, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State, is, by express enactment, beyond the reach of the federal courts or judges. (Judiciary Act, § 14; Act March 2, 1833, § 7; 4 U. S. Stats. 634; *Ex parte Dorr*, 3 How. 103, 105; *United States v. French*, 1 Gall. 1; *Ex parte Forbes*, *ante*, 363.)

When the State of Missouri arrested Dunn for an offense against its laws, there was no power in the United States government to take him from the custody of the State, and subject him to trial and punishment for his prior violation of the laws of the United States. Not only so, but the principle would be the same if Dunn had remained in Kansas, and had been in the custody of that State for an offense against its laws—he would be beyond the reach or process of the federal courts, though sitting in the same district.

In the exercise of their respective systems of criminal jurisprudence, neither the State nor the United States could admit the sufficiency of such a defense as is here pleaded. In this case Dunn was indicted for an offense against the general government of a highly penal nature. It is punished much more severely than the offense for which he was subsequently convicted in Missouri; and if the defense here insisted on were to prevail, a defendant guilty of a grave ^[412] offense would be allowed

the opportunity of evading or postponing punishment therefor, by giving bail (who incur no liability) and then committing, against another jurisdiction, a lesser offense, and submitting himself to its actual custody.

Neither a State nor a federal court can be expected to recognize as law a principle which is attended with such consequences, and which not only defeats justice, but has a tendency to encourage the commission of crime.

If cases of hardship upon sureties arise, their appeal must be to the executive department, which has the power to relieve them.

DELAHAY, J., concurs.

Demurrer sustained.

Upon the foregoing decision being made, the sureties filed an amended answer, alleging the same facts as before, except that it is stated that the larceny for which Dunn was convicted, in Missouri, was committed *prior* to the date of the recognizance or bond in suit. It is also alleged that, on the 10th day of March, 1871 (which was after the forfeiture), said Dunn *died* in the penitentiary of the State of Missouri.

The court (present MILLER, J., and DILLON, J.) sustained a demurrer to the amended answer, observing that the amendment as to the date at which the offense in Missouri was committed, did not change the legal obligations of the sureties as declared in the foregoing opinion, and that the law is settled, that the death of the principal, after default and forfeiture, does not exonerate his sureties.

Judgment accordingly.

[NOTE. — Since the foregoing decision was made the reporter has met a note of the unreported case of *Tintor v. Tailor* (to appear in 36 Conn. R.), in which a prisoner gave bond, with sureties, for his appearance at the next term of a court in Connecticut; but before the term was arrested in New York, upon a requisition from Maine, for a crime *previously* committed in the latter State, and was actually in prison therein at the time his recognizance required his appearance in the court in Connecticut; and it was adjudged that these facts constituted no defense to a suit on the bond.]

Subsequent Imprisonment by State of Principal Cognizor on recognizance to United States, not a defense to forfeiture for failure to appear. — Affirmed *Taylor v. Tintor*, 16 Wall. 370, 371, 372.

[413] UNITED STATES v. GOLDSTEIN'S SURETIES.

RECOGNIZANCE—REQUISITES TO VALIDITY.—Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer; and where, in distinct offenses, two bonds, in different sums, were required, one bond for the aggregate amount was adjudged to impose no liability upon the sureties.

Before MILLER, J., and DILLON, J.

A UNITED STATES commissioner, on proper complaint and proceedings before him, required a person charged with receiving stolen property of the United States, knowing it to be stolen, to give bail in the sum of five hundred dollars to appear at the next term, and the commissioner at the same time, on another charge of like nature, required the same person to give bail in the sum of two hundred dollars to appear at the next term, etc.; and one bond for seven hundred dollars was taken; and the principal cognizor having failed to appear, it was declared forfeited. This proceeding is a *scire facias* against the sureties.

Mr. Horton, District-Attorney, for the United States.

Stillings & Fenlon, for the Defendants.

DILLON, *Circuit Judge*.—Bonds or recognizances of this character are binding only when taken in pursuance of law and the order of a competent court or officer. No order was made authorizing a single bond for seven hundred dollars, and the *bond* taken was a substantial departure from the *bonds* required by the commissioner, and was not therefore obligatory on the sureties. (*State v. Buffum*, 2 Fost. (N. H.) 267.)

MILLER, J., concurs.

Judgment accordingly.

Note. Recognizance to Secure Appearance, on Criminal Charge, binding only when in pursuance of order of proper officer.—Cited, *United States v. Horton's Sureties*, 2 Dill. 96.

[414] SPALDING v. KRUTZ ET AL.

NOTICE TO INDORSERS—HOW GIVEN.—Where an indorser lives at the same place at which the note is payable and dishonored, notice of protest deposited in the local postoffice will bind the indorser, if actually received by him on the same day or the next.

Id.—Where an indorser lives outside of the limits of the city at which the note is payable and dishonored, notice through the postoffice to such indorser is ordinarily sufficient; but if, in such a case, the indorser has a known place of business in the city, notice of protest should be there given, although if given through the postoffice it will be sufficient if received in time by the indorser, or if received at his place of business on the day of the dishonor or the next day.

Id.—NOTICE OF PROTEST BY NOTARY.—Notice of protest given by a notary public to indorsers resident in the same place, partly in writing and partly in print, and which correctly describes the note, and contains all the essentials of such a notice, if actually received in time, is sufficient, although the signature of the notary be printed.

Before MILLER, J., and DILLON, J.

THIS was a writ of error to the district court, in which the defendants had judgment.

Royce & Hoag, for the Plaintiff.

B. F. Simpson, for the defendants.

DILLON, *Circuit Judge*.—This was an action against the indorsers of a promissory note made payable at a banking house in the city of Paola, in this State. Defense: want of legal notice. Some of the indorsers were residents of Paola, and the notice of protest was deposited in the postoffice at Paola on the day on which the note was dishonored.

We hold that if the notice of non-payment thus deposited in the postoffice was actually received by the indorsers on that day, or the next, it would be sufficient to bind them. Whether the notice was thus received is a question of fact for the jury. The instruction of the district court on this subject stated the law differently, and is erroneous.

[415] 1. One of the indorsers lived outside of the city of Paola, about two hundred yards from the city limits and a little more than a half mile from the banking house at which the note was payable. There was testimony tending to show that he did not receive the notice of protest, which had been deposited in the postoffice, until seven days had elapsed, and

that "he had a place of business in the city which he generally attended daily."

The district court instructed that the notice by the postoffice was not good, but that it should have been given at the defendant's place of business in the city. If this was a place where his own business was conducted by him—a place known to be his place of doing business—we hold that the notice of protest ought to have been left there, and could not be given through the postoffice, although if given in the latter mode and actually received by the indorser from the postoffice on that day or the next, or if within such time it was received from the postoffice by those in charge of his business house, it would be sufficient.

2. The notice of protest deposited by the notary in the postoffice accurately and fully described the note by stating the date, amount, parties, when due, demand, etc., and was partly printed and partly written, and signed by the notary public in his official capacity, but his signature was printed. The district court charged that the notice, though actually received in time, was insufficient, and that the written signature of the notary and his seal of office were requisite to convey legal notice to the indorser. This we hold to be erroneous, and are of opinion that such a notice as above described, if actually received in time, would fix the indorser's liability.

It only remains to add that the instruction asked by the plaintiff as to the custom of the bank was not, for aught that now appears, improperly modified.

MILLER, J., concurs.

Reversed and remanded.

[416] SWOPE v. SAINÉ.

TAX DEEDS—LIMITATION OF ACTIONS.—Where the county clerk assigned without authority of law, a tax sale certificate, and the tax deed was made to the assignee, the same is void on its face, and under the decisions of the supreme court of Kansas, will not support the two years' limitation statute applicable to suits to recover lands sold for taxes, no possession having been taken under the deed.

Before MILLER, J., and DILLON, J.

Ejectment. The plaintiff showed title in himself by regular conveyances from the patentee. The defendant relied on a tax deed dated January 14, 1865; recorded January 16, 1865 (which was more than two years before suit was brought), reciting a sale for taxes made at an adjourned sale, January 8, 1862, for the taxes of 1860, and upon the two year limitation statute, which is as follows: "Any suit for the recovery of lands sold for taxes, except, etc., shall be commenced within two years from the time of recording the tax deed, and not thereafter." (Comp. Laws 1862, § 11.)

The tax deed recited that the property was sold at an adjourned sale on January 8, 1862, and was bid in by the county treasurer, and certificate assigned in *June*, 1864, by the county *clerk*; and the tax deed was made to the assignee.

The defendant offered the tax deed in evidence, and the plaintiff objected, for that it was void on its face, because, (1) There was no authority to sell at any time except on the 1st day of January, 1862, or on the first Tuesday in May of that year; while here the sale was made on the 8th day of January. (2) The county *clerk* had no authority in June, 1864, to assign certificates of sales made in 1862.

Martin, Burns & Case, for the Plaintiff.

Mr. Merrill, for the Defendant.

PER CURIAM (MILLER, J., and DILLON, J., concurring).—The ^[417] court is inclined against the first objection to the deed, and to hold that the effect of the Act of 1861 (Laws of 1861, p. 286), was to authorize sales to be made on the 1st day of January, 1862, and on ensuing days by adjournments duly made.

But without deciding this question, the court holds that under the Act of March 1, 1864 (Laws of 1864, p. 70, §§ 9 and 12), the county *clerk* had no right in June, 1864, to assign the tax certificate of a sale made in 1862, that the assignment was null, and the tax deed made to the assignee was void on its face, and under the decision of the supreme court of Kansas (which this court is bound to follow), it "is insufficient to set the Statute of

Limitations in operation, so as to bar an action for the recovery of the land, in two years." (*Shoat v. Walker*, supreme court of Kansas, June term, 1870.)

There was no evidence of any actual possession taken, or held, under the tax deed. The tax deed was excluded, and the plaintiff had judgment.

Judgment for the plaintiff.

PERKINS, WARDEN, ETC. v. INGERSOLL & HENSLEY.

PRACTICE — PARTIES — OBJECTION, WHEN MAY BE TAKEN. — The objection that the plaintiff is not the real party in interest, and therefore not entitled to sue, cannot be taken for the first time after the evidence on the trial is closed.

PER CURIAM (DILLON, J., and DELAHAY, J., concurring). — This was an action at law brought in this court in the *name* of George W. Perkins, the warden of the Illinois State penitentiary, as warden (disclosing his capacity), for goods sold by him as warden, which were manufactured at the penitentiary (a public institution, belonging to the State, and governed and regulated by a public act of the legislature, but which is silent as to the name in which actions shall be brought for property sold), and the *answer* was simply a *general denial* of the allegations of the petition.

[418] We hold under the Civil Code of Kansas (construing sections 10, 28, 89, and 91 thereof), adopted as the practice of this court in actions at law, that the defendant cannot on the trial, after the evidence is closed, for the first time, object (in the state of the pleadings) to a recovery, on the ground that the plaintiff was not the real party in interest, and had no capacity, or right to sue, but that the action should have been brought in the name of the State of Illinois, as the party really concerned. (*Insurance Co. v. Osgood*, 1 Duer, 707; *People v. Banker*, 8 How. Pr. 258; *Petty v. Malier*, 14 Mon. B. 248; *Forgate v. Manufacturing Co.* 2 Kern. 584; *Mahew v. Robinson*, 10 How. Pr. 162; *Zabriskie v. Smith*, 3 Kern. 336; *Ingraham v. Baldwin*, 12 Barb. 129; *Smith v. Fah*, 15 Mon. B. 446.)

Whether the State of Illinois had legal capacity to sue in *this court* was discussed, but not decided.

McComas & Danford, for the Plaintiff.

McKeagan, Martin, Burns & Case, for the Defendant.

BARLOW v. BARNER.

STATUTE OF LIMITATIONS—WRITTEN ACKNOWLEDGMENT.—The statute of Kansas respecting the written acknowledgment, required to take a case out of the Statute of Limitations, construed and applied.

Before MILLER, J., and DILLON, J.

THIS was an action on a promissory note apparently barred by the Statute of Limitations. The statute of the State of Kansas provides, that “in any case founded on contract, when any part of the principal or interest shall have been paid, or an *acknowledgment of an existing liability*, debt, or claim, or any promise to pay the same shall have been made, an action [419] may be brought in such case within the period prescribed for the same; but such *acknowledgment* or promise must be *in writing*, signed by the party to be charged thereby.” (Gen. Stats. 1868, 634.) To show an acknowledgment in writing of an existing liability, within the meaning of this statute, the plaintiff produced certain letters from the defendant to the plaintiff’s attorney, as follows:—

First Letter—“Your favor is at hand. I was somewhat surprised to find you in possession of that somewhat celebrated note. *Now have you got possession of that note?* and if so, what are your instructions, and what is your authority in the premises? If you have the note, please state for what sum you are authorized to send it to me. Without going into detail, I just say to you that it will never be paid. I might suffer still further to have it up.”

Second Letter—“Yours in relation to Mrs. Barlow’s claim is at hand. I have already written you that I would not pay it, but still was willing to give something. I wrote Messrs. Grant

& Smith, attorneys, at one time that I would give two hundred dollars, which they refused to accept. I thought then, and think now, that was, and is, all I ought to give. If she wants something, why don't she say how much, to be done with it?"

Third Letter—"Yours of a late date I found on my return, Saturday night. I leave again this morning, will answer you some of these days, but don't know what I can answer. That note took up a due bill previously given for money to loan for Mrs. Barlow, which was deposited in Cook & Sargeant's Bank, just before their failure. I never got to the amount of one cent for it."

D. Brier, for the Plaintiff.

A. Williams, for the Defendant.

PER CURIAM (MILLER, J., and DILLON, J., concurring).—Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost frittered [420] away the Statute of Limitations; and to remedy this, statutes similar to the one in force in this State have been quite generally enacted.

The statute of Kansas requires the acknowledgment to be in writing and signed by the party, and the acknowledgment must be of an existing liability with respect to the contract upon which a recovery is sought. The letters relied on by the plaintiff do not acknowledge an existing liability, but rather repel it.

Judgment for the defendant.

IN RE THOMAS.

WITNESS FEES—ATTACHMENT OF WITNESS.—A witness in a civil cause in the United States courts, who, at the time of the service of the subpoena, demands his traveling fees and his fee for one day's attendance, cannot be attached for contempt, if he fails to obey the writ.

LD.—MILEAGE.—Mileage of witness. See note, *infra*.

Before MILLER, J., and DILLON, J.

DILLON, *Circuit Judge*.—Thomas was subpoenaed as a witness in a civil cause pending in this court, and demanded of the marshal, at the time of the service of the writ upon him, his traveling fee and his fee for one day's attendance as a witness, which the marshal did not pay. A motion is made to attach the witness. By the statute of the State, a witness who makes such a demand is not obliged, if his fees are not paid, to obey the subpoena. (Gen. Stats. 1868, 693.) So far as applicable, and when not inconsistent with the constitution and laws of the United States, these statutes have been adopted to regulate the practice in this court.

[421] Under these circumstances, as well upon general principles, the attachment must be refused.

Attachment refused.

Mr. Fenlon, for the Witness.

Mr. Lecomte, *contra*.

[NOTE.—In *Holmes v. Sheridan*, at the same term, the court ruled that witnesses living within the district, but more than one hundred miles from the place of trial, who attended in obedience to a subpoena, and give testimony, were entitled to mileage for the whole distance actually traveled. See *Prouty v. Draper*, 2 Story, 199; *Anderson v. Moe*, 1 Abb. U. S. 299; 1 Greenl. Ev. 309, 310, note; *Dreskill v. Parish*, 5 McLean, 211; *Whipple v. Cumb. etc. Co.* 3 Story, 84; *Hathaway v. Roach*, 2 Wood. & M. 63, Conklin's Treat. 464, 466.]

HOBSON ET AL. v. MARKSON ET AL.

BANKRUPT ACT—GENERAL ASSIGNMENTS UNDER STATE LAW.—A previous voluntary general assignment for the benefit of creditors, made in good faith, and valid under the law of the State where made, will not be sustained against a valid adjudication of bankruptcy.

ADJUDICATION OF BANKRUPTCY—COLLATERAL ATTACK.—An adjudication made after the return day, but upon petition and appearance, will be sustained in a collateral inquiry.

PER CURIAM (DILLON, J., and DELAHAY, J., concurring) — In sustaining a demurrer to the bill (filed by assignees under a voluntary general assignment against assignees in bankruptcy and the petitioning creditors), the court delivered a written opinion, ruling the following points:—

1. A valid adjudication of bankruptcy against a debtor has the effect to subject him and his property to the operation of the bankrupt act, notwithstanding a previous voluntary general assignment for the benefit of creditors; and the assignee in bankruptcy, as against the assignee under the State law, is entitled to the possession and control of the estate. (*In re Burt, post.*)

2. An order of the district court, adjudicating a debtor a bankrupt, made after the return day, but upon a petition of a [428] creditor, and after notice to, and appearance by, the debtor, though it may be irregular, is not void, and cannot be collaterally assailed by his assignees under a previous voluntary assignment.

Wallace, Pratt, Williams, and Wagstaff, for the Plaintiffs.

Britton, Rogers, Hoag, and Wheat, for the Defendants.

Note. Voluntary Assignment by Debtor, though free from fraud, is an act of bankruptcy. — Followed, *Cragin v. Thompson*, 2 Dill. 515; S. C. 12 Bank. Reg. 83. Cited, *In re Moses*, 6 Bank. Reg. 180.

UNITED STATES v. HAWTHORNE.

CRIMINAL LAW — COMPETENCY OF THE DEFENDANT TO TESTIFY. — In the courts of the United States a defendant in a criminal case cannot testify in his own behalf, although by statute his testimony is admissible in the courts of the State.

Before MILLER, J., and DILLON, J.

INDICTMENT for having in possession counterfeit treasury notes, with intent, etc., contrary to the acts of Congress. By a statute of the State of Kansas, defendants in criminal cases are allowed to testify in their own behalf. On the trial the defendant's counsel offered the defendant as a witness to testify in his own favor, relying on the aforementioned statute of the State.

Mr. Horton, District-Attorney, for the United States.

Merrill & Cuse, for the Defendant.

PER CURIAM (MILLER, J., and DILLON, J., concurring).—Crimes against the United States are wholly withdrawn from the domain of *State* legislation. They are created solely by Congress, and Congress has provided for their prosecution and the mode of procedure. Under section 34 of the judiciary act, as construed by the supreme court (*United* ^[428] *States v. Reid*, 12 How. 361), and under the Act of July 6, 1862 (12 U. S. Stats. 588), and of July 2, 1864 (13 U. S. Stats. 351), it is clear that the right of a defendant, in a criminal case, to testify in his own favor does not exist. On the contrary, the language used manifests an evident intention on the part of Congress to exclude such evidence.

Testimony excluded.

[NOTE.—Right of parties to testify in civil cases (*Berry v. Fletcher*, ante, 66); in chancery cases (*Rison v. Cribbs*, ante, 181). In the case of the *Ten Thousand Cigars*, 1 Woolw. 123, 1867, it was decided by MR. JUSTICE MILLER that the phrase “civil action” in the Act of July 2, 1864, “includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which the rights of property are involved, whether between private parties, and such parties and the government, and is used in contradistinction to criminal actions,” and he accordingly held that the claimant of property seized for a violation of the internal revenue laws was made by the general act a competent witness in his own behalf, and that his right to testify was not repealed or modified by the Act of February 28, 1865, § 2, or by the Act of July 13, 1866, § 9.

A defendant, in a civil action brought by the government, is competent to testify in his own behalf under the Act of July 2, 1864. (*Green v. United States*, 9 Wall. 655, 1869.) So a relator in habeas corpus. (*Ex parte Reynolds*, 6 Parker Cr. R. 276.) Under Act of March 3, 1865 (13 U. S. Stats. 533), the court will not make an order for examination of a party, when such an order would not be allowed by the laws of the State. *Robinson v. Mandell*, 8 Am. Law Rev. 377.]

Crimes against the United States are not within the operation of State laws of State procedure.—Followed, *United States v. O'Brian*, 3 Dill. 384.

DISTRICT OF MINNESOTA.

[424] HOME INSURANCE COMPANY (OF NEW YORK)
v. STANCHFIELD AND NEWMAN.

EQUITY JURISDICTION—BILLS TO CANCEL INSURANCE POLICIES FOR FRAUD.—A bill in equity by an insurance company against the assured, to enjoin an action at law on the policy, and to cancel the same because it was procured by false and fraudulent representations, ought to be dismissed when it is solely founded upon matters which, if true, are a defense to the law action, and where no reasons are shown making a resort to equity necessary or expedient.

ID.—WHEN REMEDY IS ADEQUATE AT LAW.—Accordingly, where such a bill was not filed until after the loss had happened, and where, in consequence of a short limitation clause in the policy and averments in the bill that an action was threatened, it appeared there was no danger of long or indefinite delay, and where no reason was shown why the matters charged in the bill were not plainly available as a complete defense at law, the court dissolved the injunction and dismissed the bill.

ID.—WHEN BILL WILL LIE.—It seems that such a bill would lie if filed before loss. (Per MILLER, J., and DILLON, J., *arguendo*.)

ID.—DISCOVERY.—Where discovery is the ground of equity jurisdiction, if the discovery fails, the bill must be dismissed, although there may be evidence *aliunde* sufficient to establish a right to relief.

[425] ID.—PARTIES COMPETENT TO TESTIFY.—*Quere*, as the effect of legislation, making parties to suits competent witnesses, and compelling them to testify at the instance of their adversary, upon the right to file a bill merely to obtain a discovery in aid of another action or defense.

Before MILLER, J., and DILLON, J.

THE bill states, in substance, that the complainant is a foreign insurance corporation, and that the respondents are citizens of the State of Minnesota; that on the 15th day of December, 1858, it issued its policy of insurance to the respondent Stanchfield, the loss, if any, to be paid to the respondent Newman, whereby the complainant, in consideration of the sum of \$45 dollars premium, agreed to insure the said Stanchfield for one year, against loss by fire, to the amount of \$3,000, on his three-story stone building in the city of St. Anthony, Minnesota.

The bill alleges that when Stanchfield applied for insurance on the building, he made to the agent of the complainant the following representations:—

1. That he was the owner of the building and ground on which it was situate.

2. That the property was not encumbered, except by a mort-

gage executed to a party outside of the State, which mortgage was without consideration and invalid, having been given to protect the property from his creditors.

3. That the building was worth \$6,000, and that he had been offered that for it by a Mr. Sidle a short time before.

The bill states that these representations were false; that Stanchfield was not the owner, but does not allege who was; that the building was not worth \$6,000, but only \$1,500, and that Mr. Sidle never made any offer to purchase it.

The bill particularly states that in addition to the mortgage which was admitted to exist, there was a mortgage to Pinney & Dorman for \$2,727, a mechanic's lien in favor of ^[428] Alden, Cutter & Hall for \$1,365, and a mortgage to Corwith & Co. for \$18,000.

It is alleged that the complainant was ignorant of the existence of these encumbrances; that it relied on the representations so made; that the said Stanchfield knew they were untrue, and made them fraudulently to deceive the complainant and to procure the policy. It is also averred that the building insured was destroyed by fire on the 19th day of November, 1869, and that the falsity of the representations made by Stanchfield to procure the policy, and his fraud in that respect were not discovered until two weeks before this bill was filed, which was on the 23d day of March, 1870. The bill also states that the policy has been demanded back of the respondent, and the premium money tendered to him, but that he refuses to accept the money or give up the policy; but on the contrary, threatens to institute a suit thereon.

The bill asks for a temporary injunction to restrain the defendants from commencing an action in any court upon the policy, and that on the final hearing the defendants may be decreed to deliver up to the complainant the policy to be cancelled, and that it be declared null and void, and for general relief. On the bill, and before answer, a temporary injunction was allowed by one of the judges of this court. The answer has since been filed, admitting the issuing of the policy, the loss, the intention to sue on the policy, but denying generally and specially the alleged fraud, or fraudulent representations or intent. The answer states that the defendant Stanchfield was

and is the owner of the building and the ground. It admits that the defendant Newman (a son-in-law of Stanchfield), by agreement between the parties, paid taxes for the purpose of preventing the property from being sold to strangers, and for the benefit of Stanchfield, who was to reimburse him; that in 1865 (as the defendant Stanchfield has learned since the fire), Newman, in paying taxes, took a certificate of sale, but the answer alleges that he ^[427] never made any claim by virtue of the said tax sale, and that prior to the fire, namely, in February, 1869, the amount which Newman had paid for taxes was repaid to him by Stanchfield. The answer admits that Stanchfield, when he applied for insurance, did state that he owned the property, and it denies that such is not the fact, but avers, as above stated, that he did and does own it. As to the value of the building, the answer admits that Stanchfield stated to complainant's agent that it was worth \$6,000; and it alleges that it cost \$18,000, and was worth \$9,000, and that the agent of the company made a personal examination of the building to learn its value, and that he relied on that and not on any representation or statement of Stanchfield.

The answer admits that Stanchfield stated to the complainant's agent, not that Sidle had made a formal offer of \$6,000 for the property, but that he said he would pay that sum therefor.

Respecting the encumbrances the answer alleges that Stanchfield stated that there was a mortgage to Corwith & Co., of Galena, Ill., for \$18,000, which had been voluntarily given in 1858, to secure future or contemplated advances, and also to keep off some unjust claims; but he denies that he stated that it was invalid or without consideration, and he thinks he is now owing nothing upon it. It denies representing that this was the only mortgage or encumbrance, but admits that Stanchfield represented, that aside from certain judgment liens it was the only encumbrance.

It alleges that the mortgage to Pinney & Dorman for \$2,727, mentioned in the bill, has long been paid, and denies the existence of the alleged mechanic's lien in favor of Alden, Cutter & Hall. A copy of the policy is filed with the answer. On the coming in of the answer the defendants moved, at the June term, 1870, upon the bill and answer, before MR. JUSTICE MILLER and DIL-

LON, circuit judge, for a dissolution of the temporary injunction, upon two grounds: (1) The answer denies the material averments of the bill; (2) the bill contains no ^[438] sufficient equities to give the court jurisdiction in chancery, or to warrant the injunction. It is this motion which is now before the court to be decided.

Atwater & Flandrau, for the Motion.

H. H. Finley, and *C. K. Davis*, *contra*.

DILLON, *Circuit Judge*.—This is a bill in equity by the Home Insurance Company of New York, to cancel a policy of insurance against fire, issued by it to the respondent, Stanchfield, and for an injunction to restrain him from commencing action thereon. The policy was in the usual form of such instruments, and by its terms was to continue in force for *one year*, or until December 15, 1869. In November, 1869, the building covered by the policy was consumed by fire, and in the March succeeding, the present bill was exhibited. The nature of the bill appears above, and it is, in substance, one to have the policy declared void because it was procured by the assured by means of false and fraudulent representations. A temporary injunction to restrain the respondents from commencing any action on the policy was allowed before answer. On the coming in of the answer, which denies the alleged fraud and fraudulent representations, a motion is made to have the order for the injunction vacated; and it is this motion which was argued by counsel, and which the court is now to decide. But the solicitors for both parties desired the questions arising on the bill and answer to be disposed of on their merits, and to have the court determine whether bills like the present one are maintainable in equity, when the fraud alleged as a ground for the cancellation of the policy is available to the company as a defense to an action on the policy, and constitutes, if proved, a complete defense thereto.

Under the full denials in the answer of the fraud charged in the bill, there would be little hesitation in holding that the injunction ought to be dissolved; but though dissolved, the bill

would yet be pending, and the question as to the right to maintain such a bill would still remain to be decided.

[420] The complainant's solicitor maintains that the bill is sustainable upon two grounds: (1) Because a *discovery* is sought, and relief consequent upon the discovery. (2) Because courts of equity have jurisdiction concurrent with courts of law in matters of fraud, and will, in all cases, set aside agreements obtained by means of false and fraudulent representations. Of these grounds in their order; and first as to the discovery. This is not a bill for discovery in aid of a suit or **defense** at law, and it is only a bill of discovery in the same general sense that every bill is such which **seeks** an answer from the defendant under oath. It is simply a bill calling for an answer under oath, **and** praying that a policy of insurance be set aside because it was procured by fraud. Bills of discovery had their origin at a time when *at law* a party was not entitled to and could not obtain the evidence of his adversary. By the legislation of Minnesota (Stats. 1866, 520), and by that of Congress (Act of July 6, 1862, 12 U. S. Stats. 588; Act of July 2, 1864, 13 U. S. Stats. 351), parties to suits at law, in equity and admiralty, are not only permitted to testify in their own behalf, but compellable to testify at the instance of the adverse party. (*Berry v. Fletcher*, ante, 66; *Rison v. Cribbs*, ante, 181; *United States v. Hawthorne*, ante, 422.) The effect of this legislation is to remove the grounds or reasons which originally existed for bills of discovery, and it may admit of doubt whether a bill merely to obtain discovery in aid of another action or defense ought longer to be sustained; but this is a point not now necessary to be determined. If the present bill be treated as one for discovery and relief, and as one where the necessity of obtaining a discovery is the ground of equity jurisdiction, the discovery sought has failed, for the answer denies all the essential averments of the bill charging fraud, and where this is the result the bill must be dismissed.

Speaking of such a case, Mr. Justice Story says: "If the discovery is totally denied by the answer, the bill must be dismissed, and the relief denied, although there might be [430] other evidence sufficient to establish a title to relief, for the subject-matter is, under such circumstances, exclusively remediable at

law." (Story Eq. Jurisp. § 691 ; Story Eq. Jurisp. §§ 74, 690.) As to the first ground of equitable jurisdiction, viz., the necessity for a discovery from the defendant, it fails because the complainant has failed to obtain the discovery he sought. (*Brown v. Swann*, 10 Peters, 497 ; *Russell v. Clark*, 17 Cranch, 69, 89 ; *Young v. Colt*, 2 Blatchf. 373.)

We are thus brought to the main question argued by the counsel, whether equity will entertain a bill to cancel a fire policy, filed *after* a loss has happened, where the foundation for the relief sought is the fraudulent representations of the assured in procuring the policy, with respect to the property, its ownership, value, the state of the encumbrances, etc., when such fraudulent representations are a good defense at law to an action on the policy, and available as such to the company.

If such a bill will lie, the present suit having been brought, and properly brought, the assured would not be allowed afterwards to sue at law on the policy, pending the equity suit to cancel it, and hence an injunction to restrain the commencement of such an action, if threatened, would be proper. But, if on the other hand equity will not entertain such a bill as the present, of course the injunction should not have been allowed, and ought to be dissolved.

The injunction feature of the present suit is thus dependent upon the principal inquiry before us, and we shall give no separate consideration to it. The policy to which this suit relates contains two provisions, usual in such instruments, to which reference may be made, as bearing upon the question to be decided. One is that the loss, if any happens, is not payable *immediately*, but only after the preliminary proofs required by the policy are furnished. The other is "that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, ^[431] unless such suit or action shall be commenced within the term of *twelve months* next after any loss or damage shall occur," etc.

It may be here remarked that it is settled law that a condition in a policy requiring any action thereon to be brought within a limited and specified time is valid and binding. (*Ripley v. Aetna Insurance Co.* 30 N. Y. 136 ; *Roach v. New York Insurance Co.*

30 N. Y. 546; *Carter v. Insurance Co.* 12 Iowa, 287; *Gray v. Hartford Insurance Co.* 1 Blatchf. 280.)

It is our opinion that the present bill sets forth no sufficient grounds for equitable interference, and we now proceed to state the reasons on which this opinion rests. No principle is more familiar than the one that where the law affords a full, complete, and adequate remedy, equity will not interfere." "Chancery," says Lord Bacon, "is ordained to supply the law, not to subvert the law." (4 Bac. Works, 488.) In other words, the parties must litigate in the law courts, unless there are good or legal reasons for invoking the aid of equity. This principle or rule must have full effect given to it in the courts of the Union, for it is recognized by the constitution, and by the judiciary act.

The constitution declares that "in suits at common law . . . the right of trial by jury shall be preserved" (Amendments, art. vii.), and the judiciary act, in terms, provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy can be had at law." (1 U. S. Stats. 82, § 16.)

In the case before us, no reason is set forth in the bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. Before the bill was filed, the loss had happened. By the terms of the policy, the assured was bound to sue within a year, or be forever barred. The bill alleges that he is about to bring an action on the policy. If the facts averred in the bill are true, they constitute a complete defense to such an ^[433] action, and nothing is set forth showing that any obstacles stand in the way of making this defense at law. If no loss had happened, and especially, if the policy had many years to run, such as life policies, there would seem to be a necessity to sustain a resort to equity to cancel the contract, where it had been procured by fraud. But such is not the case now before the court. There are, however, other and perhaps more satisfactory grounds for not entertaining the present bill. The bill is one to have a contract, made between the parties, decreed to be delivered up to be cancelled. This cannot be done without wholly taking the matter out of the law courts, and cutting off all actions in those courts. If this bill is not sustained, the parties are simply left to their legal rights and

remedies. If no hardship, no injustice, will result, and no reason appears for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity, to have "instruments cancelled or delivered up, is not, strictly speaking, a matter of right, . . . but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case." (2 Story Eq. Jurisp. § 693.)

Chancellor Kent, in holding that a court of equity had full power to order instruments to be delivered up, whether void or not, at law, and even if void on their face, after reviewing some of the leading English cases, says: "But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps," he adds, "the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; *and that the resort to equity, to be sustained, must be expedient*, either because ^[433] the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." (*Hamilton v. Cummings*, 1 Johns. Ch. 517, 523; referred to by Marshall, C. J., in *Pearsall v. Elliott*, 6 Peters, 95.)

Applying these principles to the present case, we need not deny that equity has jurisdiction, by reason of the fraud alleged, to entertain the suit; but are of the opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties at law seems a more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because, (1) The company has a full, plain, and perfect defense to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper. (2) Action at

law on the policy must (as we have seen) be brought in a short, limited time after the loss. In the present case, only about seven months remained to the assured, and the bill alleges that he was about to bring suit; the purpose of the present bill is, therefore, manifest, viz., to force the assured to litigate in equity instead of at law, thereby depriving the party of the right to a trial by jury. (3) If the bill be entertained because the insurance company has the right to resort to equity, then all similar bills must likewise be entertained in equity, and this gives the companies the advantage of a choice of forum. If the company prefers to litigate in equity, it will file its bill before the preliminary proofs are furnished, and thus compel the assured to settle the controversy in that court. If, on the other hand, the company prefers to litigate at law, it will simply omit to file a bill, and await the action of the assured, who, unless there is some special ground for going into equity, *must* be content with his legal remedies. (4) The effect of sustaining ^[434] the right to resort to equity would be to transfer the great bulk of all litigation arising out of losses under policies from the courts of law into the courts of equity. The business of insurance is now almost wholly carried on by companies of large capital, and these are, in most instances, foreign corporations. From the supposed sympathy of jurors in favor of the assured as against the insurance company, and from the supposed even-handed impartiality of the judge, it is not difficult to see that companies having the choice of courts would prefer the equitable to the legal forum, in almost all cases. And the court must say that it is the result of its experience, in the trial of insurance cases, that the fears which the companies entertain as to the sympathy of the jurors in favor of the assured have, by far, too much foundation. But the remedy lies in the more liberal exercise by the common-law courts of the power to grant new trials where verdicts are clearly wrong, and not in an extension of equity cognizance over controversies and issues in their nature essentially legal.

Having discussed the case on principle, it is due to its intrinsic importance, as well as to the importance which counsel attach to it, and the care with which they have prepared their arguments, that we should also examine it in the light of authority. All

the cases referred to by counsel have been examined. Many of them are meagerly reported, and very unsatisfactory, and some of them conflicting. The result of the examination is the belief that the weight of modern judicial opinion is in favor of rather than against the views above expressed.

It may be admitted that the early English cases below mentioned would favor the retention of the present bill, for equity seems then to have exercised a very free jurisdiction, and to have cancelled policies with a liberal hand, even where there was a complete remedy or defense at law. Referring to this, Sir James Mansfield, C. J., in a case before him, said: "Courts of equity formerly exercised an odd jurisdiction ^[485] on this subject [*Cousins v. Nantes*, 3 Taunt. 517], alluding, perhaps," says Mr. Phillips, who quotes the passage, "to cases of interference by equity courts, where there was an adequate remedy at law." (2 Phil. on Ins. pl. 1933.)

But, at the present day, insurance contracts are regarded by the courts as standing upon the same footing with other contracts, and there must be some good reason for a resort to equity with respect to them, else the parties, both the insurer and insured, must remain satisfied with their legal remedies.

The true doctrine is stated by Mr. Phillips (2 Phillips Ins. p. 574, pl. 1933). He says: "Courts of law have the usual jurisdiction upon policies of insurance." After noticing the former course of the equity courts, he adds: "The limits of the jurisdiction in law and equity, in respect to policies, are now as well settled as in respect to any other species of contracts, the general jurisdiction being in the courts of law, with exceptions upon the same grounds as other contracts." It is proper to observe that he subsequently says: "A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy fraudulently obtained" (2 Phillips Ins. pl. 1988); and Mr. Angell adopts his language. (Fire Ins. § 384.)

The material cases referred to by these authors, together with other cases, will now be briefly noticed in the order of their occurrence.

In *Whittingham v. Thornberg*, 2 Vern. 206, A. D. 1690; S. C. 3 Eq. Cas. Abr. 635, a life policy was obtained by fraud.

After the loss, the court ordered the policy to be delivered up to be cancelled, and a perpetual injunction against the verdict obtained thereon at law. This case is very briefly reported, occupying but a few lines. The grounds on which equity interfered, not only with the policy, but with the verdict at law, are not stated. No point appears to have been made upon the jurisdiction in equity. In the report in 3 Eq. Cas. Abr. *supra*, it is said the answer ^[498] confessed the fraud. In *Goddart v. Garret*, 1 Eq. Cas. Abr. 371, A. D. 1692; S. C. 2 Vern. 269, which was a bill to have a marine policy delivered up because the insured had no interest in the property covered by the policy, the court made a decree as prayed, although there appears no reason why the defense was not open to the insurer at law. No question is made or discussed as to the ground of equitable interference; and this was the case cited by counsel when Mansfield, C. J., made the observation above quoted from 3 Taunt. 517, as to the odd jurisdiction formerly exercised by equity over policies of insurance. In *DeCosta v. Scandret*, 2 P. Wms. 170; S. C. 3 Eq. Cas. Abr. 636, A. D. 1723, the assured fraudulently concealed from the underwriter information which he had that his ship was in danger. Without anything being said in the very brief report of the case about jurisdiction, Lord Macclesfield, on a bill for injunction (against what does not appear), and relief, decreed the policy to be delivered up, with costs. In *French v. Connelly*, 2 Anstr. 454, 1794, which was a bill by underwriters for an injunction to restrain a suit at law, and for discovery and relief from the policy, because obtained by fraud, the court overruled a general demurrer to the bill, and properly enough, for at all events the underwriters were entitled to a discovery to aid the defense at law. The next case which it is deemed necessary to notice is that of *Duncan v. Worrall*, 10 Price, 31, 1821. In this case a bill by the underwriters for an injunction against an action at law on the policy, and to have the same cancelled because of false and fraudulent representations as to the neutral character of the property insured, "was dismissed on the ground that it was founded on matters which, if true, afforded a defense to the action at law, and therefore there was no equity on the part of the plaintiff to warrant the interference of the court of equity."

The Lord Chief Baron Richards alludes in strong language to his experience of over forty years, respecting bills to stay ^[437] actions on policies, and to cancel them; said he had never known one to have been brought to a hearing, and observed, "that Lord Chief Baron Eyre, who was always, we know, considered a strong-headed man, used to say that he considered bills for discovery and injunction by underwriters in these cases as being filed, for the most part, merely with a fraudulent intention to create delay, and I never remember one to have been acted on further than the dissolving the injunction." *Fenn v. Craig*, 3 Younge & C. 216, 1838, also occurred in the exchequer in equity. It was a bill by a life insurance company to cancel a policy on the life of a third person, obtained by the defendant by fraudulent representations as to the habits of the assured. The bill was filed promptly the next year after the insurance was made and before the death occurred. It was held on demurrer that the bill would lie, Alderson, Baron, observing that the equity was strengthened because suit was brought in the lifetime of the person who was insured. This was right, and is not in conflict with the views expressed in the foregoing opinion, but rather co-incident with them. *Thornton v. Knight*, 16 Sim. 508, 1849, holds that even after a verdict at law against a policy, equity will not entertain a bill to cancel it, unless some equitable ground be shown, such as fraud. In the *India etc. Co. v. Dalby*, 7 Eng. L. & Eq. 250, 1851, the vice-chancellor, on a bill to restrain an action at law, overruled a demurrer to the bill on the ground that there was an *equity* stated against the action. It is not readily perceived what equity was stated not available as a defense to the law action; but if an equity was alleged, the case is consistent with correct principle, viz., that equity will not interfere except where the remedy at law is inadequate, difficult, or uncertain.

The foregoing are the leading adjudications on the subject under consideration in England, and it is quite a significant circumstance against the present bill that the American reports do not show that any similar bill has been filed.

^[438] The cases in the English books show that when bills are entertained, injunctions are refused or dissolved, thus leaving the real litigation to be had at law. If the verdict is for the

policy, of course the bill is dismissed. If against it, then the bill may be brought to a hearing, and the court will, in proper cases, order the policy to be surrendered, an order which, after such a verdict, is quite unnecessary and useless. The English cases referred to are not, as before observed, very satisfactorily reasoned, and are not free from conflict. The old cases are entitled to very little respect as authority, and the modern ones tend to show that equity will not oust the law jurisdiction, or interfere with the legal remedies where there is a full defense at law, and no obstacle in the way of making it. Insurance contracts should stand upon the same footing as other contracts with respect to equity interference, else we have an anomaly in the law without any reason to justify it. The result is that the motion to dissolve the injunction is well taken, and must be sustained.

MR. JUSTICE MILLER, concurring in the foregoing result, observed: "I am entirely satisfied with the opinion prepared by the circuit judge, both with the result and the course of argument by which that result is attained. I think the turning points of the case are that the loss had occurred before the bill was filed, and that by reason of the limitation in the policy as to the time of bringing suit, and the allegation that the defendants were threatening to sue at law, there is no danger of indefinite delay, nor is there any other circumstance alleged warranting a resort to equity. In case such a bill were filed before loss, or if a life policy, before death, I am strongly inclined to believe it should be sustained.

Injunction dissolved.

[NOTE. — Afterwards the court sustained a general demurrer to the bill, and dismissed the same. The course of argument by Marshall, C. J., in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, seems to support the conclusion reached in the foregoing case.]

Insurance policies will be cancelled in equity for fraud.— Cited, *Life Insurance Company v. Bangs*, 103 U. S. 783; S. C. 2 Morr. Trans. 802; *Bowden v. Santos*, 1 Hughes, 160.

[439] IN RE BURT, BANKRUPT.

BANKRUPT LAW — VOLUNTARY ASSIGNMENTS. — A voluntary assignment by a debtor, under State laws, though free from fraud, and embracing all of his property, and made for the benefit of all of his creditors, is an act of bankruptcy within the meaning of the bankrupt act.

BANKRUPTCY — SUSPENDING PAYMENT OF COMMERCIAL PAPER. — *Quere*, whether the mere fact of a trader suspending payment of his commercial paper for fourteen days, constitutes, irrespective of any ingredient of positive fraud, an act of bankruptcy.

ID. — FRAUD, WHEN ESSENTIAL ELEMENT. — MR. JUSTICE MILLER inclined to the opinion that fraud, in fact, was not essential in such cases, but the question was left undecided.

Before MILLER, J., and DILLON, J.

In Bankruptcy. Burt was proceeded against by certain of his creditors in the district court for the district of Minnesota, under the thirty-ninth section of the bankrupt act. Two acts of bankrupt were charged in the petition.

1. That being a merchant, or trader, he had fraudulently stopped, or suspended, and not resumed payment of his commercial paper for a period of fourteen days. 2. That he had made, under the statutes of the State of Minnesota, a voluntary assignment of all of his property for the benefit of all of his creditors.

The district court, NELSON, J., adjudged him a bankrupt, and from this judgment he appealed.

George L. Otis, for the Petitioning Creditors.

Allis, Gilfillan, and *Williams*, for the Debtor.

MR. JUSTICE MILLER, delivering orally the opinion of the circuit court on the appeal, in substance said:—

As to the first act of bankruptcy charged in the petition, there is no proof in the case of any fraud, or wrong intention on the part of the debtor in stopping, or suspending and not resuming payment of his paper; and the question made and [440] argued by counsel was, whether fraud in fact is an essential element when this ground is relied on by the creditors, to make a man a bankrupt. I am aware, he continued, of the different views which have been expressed in the inferior courts upon

this subject. My present inclination is to the opinion that the mere fact of a trader or merchant suspending and not resuming payment of his commercial paper without legal excuse, for the period prescribed by the act, constitutes, irrespective of any ingredient of actual fraud, an act of bankruptcy; but as I have a clearer conviction upon the second ground, I pass the above question without pronouncing any more decisively respecting it.

My opinion is that a voluntary assignment by a debtor, under State laws, though such assignment be made for the benefit of all of his creditors, and be free from fraud, is, within the meaning of the bankrupt act, an act of bankruptcy.

The effect of such an assignment is to take or withdraw the property of the debtor from the bankrupt act, and to defeat its operation; and the debtor must, on familiar principles of law, be presumed to intend that effect.

Accordingly, the order of the district court adjudging the debtor a bankrupt was affirmed.

DILLON, C. J., concurred.

Affirmed.

[NOTE.—*In re Cowles*, decided by Mr. District Judge Nelson, in 1869, ruled that it was not necessary to show the stoppage of payment to be fraudulent; it is sufficient if the party, being a trader, or within the act, suspends and does not resume payment of his commercial paper for the prescribed period. (S. P. in Iowa district, *In re Hall*, *post*; see Act of July 14, 1870, 16 U. S. Stats. 276.) Judge Nelson also ruled in the same case that a person engaged in the manufacture and sale of lumber as an article of merchandise is a *trader*, within the meaning of this provision of the act.]

Suspension of Payment of Commercial Paper is an act of bankruptcy, irrespective of fraud.—Cited, *In re Hall*, *post*, 587; *Cragin v. Thompson*, 2 Dill. 515; S. C. 12 Bank. Reg. 83; *In re Marter*, 12 Bank. Reg. 186.

[441] WEIDE v. GERMANIA INSURANCE COMPANY.

FIRE INSURANCE — REFUSAL TO ANSWER. — Under certain provisions of a fire insurance policy, the refusal of the assured to submit to an examination on oath, or to answer material questions respecting the loss, was considered not to work a forfeiture of the policy, but only not to cause the loss not to be payable until this was done; and such refusal should be pleaded in abatement, and separately from defenses in bar.

LD.—FALSE STATEMENT ON OATH BY ASSURED.—False statements on oath by the assured, with intent to deceive the company, relative to the terms of settlement with other companies having risks on the same property, are material, and will defeat any right on the part of the assured to recover.

LD.—EFFECT OF FRAUD.—If the assured, after the loss, with intent to deceive the company, exhibits to it books of accounts containing false entries of a material nature, this is a fraud, and will defeat all right to recover upon the policy.

Before MILLER, J., and DILLON, J.

Action on fire insurance policy. The policy contained the usual condition as to the duty of the assured to give notice of the fire, and to render a particular account of the loss signed and sworn to by the assured, and to produce a certificate of a magistrate as to the loss, and his opinion as to its *bona fides*. It was also provided therein that “the assured shall, if required, submit to an examination, under oath, by the company, and produce his books of accounts, vouchers, copies of bills and invoices, and exhibit the same for examination.” The policy also provided for an appraisement of the property insured in case of loss by fire. Then followed clauses in the policy in the following words, viz.: “And until such proofs, declarations, and certificates are produced, and examination and appraisal permitted, the loss shall not be payable.” “All fraud or attempted fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under the policy.”

Allis, Gilfillan & Williams, for the Plaintiff.

Storrs, Lamprey, Paul, and Brisbin, for the Defendant.

[448] PER CURIAM (MILLER J., and DILLON, J., concurring).—It was held, 1. Under the above provisions of the policy, that a refusal on the part of the assured, to submit to an examination on oath, or his refusal, on such an examination, to answer material questions respecting the loss, would not have the effect to cause a “forfeiture,” by the assured, of all claim under the policy, but simply to cause the “loss not to be payable,” until such examination is submitted to, or such answer given.

2. That a defense under the clause that the assured had thus refused to be examined, or thus to answer questions, is in the nature of a plea in abatement, showing no present cause of

action, and should be pleaded separately from the defense of "fraud" or "false swearing" which, if established, is a complete bar to a recovery, at any time, on the policy.

3. Under a plea setting up the defense of "false swearing"; held by the court that false swearing by the assured, either in the preliminary proofs of loss, or in the examination on oath as required by the policy, in a matter material to the rights of the company, with intent to mislead the company, would work a forfeiture of the policy; and false statements by the assured, on such examination, with intent to deceive and mislead the company, relative to the terms of settlement by the assured with *other* companies which had insured the same property, are material, and will defeat any right to recover under the policy.

4. Under the defense of "fraud," properly pleaded; held, that if the assured, after the fire, with intent to deceive the company, exhibited to it books of accounts, in which there were false entries as to the value and amount of the goods insured and claimed to have been burned, this would be a fraud, or an attempt at fraud within the meaning of the policy, and would forfeit all rights thereunder.

[NOTE. — So in Missouri and Pennsylvania, it is held that the false statement, to work a forfeiture of all claim under the policy, must be wilfully [443] made with respect to a material matter, and with intent to deceive the insurer. (*Marion v. Great Repub. Ins. Co.* 35 Mo. 148; *Franklin etc. Ins. Co. v. Updegraff*, 43 Pa. St. 350.) Questions of evidence ruled by the supreme court in cases connected with this loss. *Insurance Co. v. Weide*, 9 Wall. 677; 11 Wall. 488.]

Note. Judgment affirmed on appeal, 14 Wall. 375.

GEIB v. INTERNATIONAL INSURANCE COMPANY.

FIRE INSURANCE — PRIMA FACIE CASE. — If the plaintiff on the trial of an action on a policy of fire insurance, produces the policy, and shows the loss, the delivery of the preliminary proofs, and the value of the property destroyed by the fire, he makes out a *prima facie* case.

ID. — FRAUDULENT OVER-VALUATION. — Fraudulent over-valuation of the property in the preliminary proofs held to be a "fraud" "or attempt at fraud," within the terms of the policy, and to defeat any right to recover thereunder.

ID. — FALSE STATEMENTS BY ASSURED. — False statements by the assured in the application respecting the existence of a mortgage on the property insured, held to avoid the policy.

LD.—ESTOPPEL.—What acts and conduct on the part of the local agent of the company, who wrote out the application and issued the policy, will estop the company to set up the existence of the mortgage to defeat the action.

SUBSEQUENT INSURANCE IN OTHER COMPANIES.—Subsequent insurance by the assured in other companies in contravention of the terms of the policy will, if it so provides, avoid the same.

LD.—WAIVER BY COMPANY OF CONDITIONS IN POLICY.—Certain circumstances held to amount in law to a waiver by the company of the condition of the policy respecting the amount allowed to be insured in other companies.

Before DILLON, J., and NELSON, J.

ACTION on insurance policy. The answer sets up three defenses:—

1. Fraudulent over-valuation of the property insured.
2. False statements respecting the existence of a mortgage on the insured property.
3. Over-insurance in contravention of the terms of the policy in suit. By the practice of the court, adopting the State practice, no replication was filed, but the answer is to be [444] deemed controverted, and the plaintiff may meet the defense either by a denial or by matter in avoidance.

The defendant's company was represented at the city of St. Paul by Messrs. Etheridge & Powell, who had the power to issue and cancel policies, and to change or consent to the change of the terms and conditions thereof. The application on which the policy in suit was issued, was filled up by the said local agents of the defendants, and was signed by the plaintiff, at the time the policy was delivered to him by the agents of the company. The plaintiff's testimony and that of the agent who acted for the company (Mr. Etheridge), was in conflict as to whether the agent at the time when the application was signed, asked the plaintiff the question, *whether there was any mortgage on the property?* and as to whether the plaintiff answered it. The other facts relating to this point sufficiently appear in the opinion of the court.

The firm of Etheridge & Powell were not only the local agents of the defendant, but also of the Home Company, which, *through the said firm*, issued a policy to the plaintiff, on the same property and at the same time the policy in suit was issued; and they were also the local agents of the Enterprise Company, and acting for it, soon afterwards issued the policy to the plaintiff which

is now set up by the defendant as constituting an over-insurance, contrary to the terms of the policy in suit. The other facts in respect to this subject are stated in the charge of the court.

Messrs. Allis, Gilfillan, and Williams, for the Plaintiff.

Messrs. Lampreys, for the Defendant.

DILLON, *Circuit Judge* (NELSON, J., concurring), in summing up to the jury, said:—

1. This is an action on an insurance policy issued by the defendant to the plaintiff, dated August 1, 1867, by the terms of which the insurance company agreed to insure the plaintiff "on his two-story frame building," in St. Paul, in the sum ^[445] of one thousand dollars against loss or damage by fire for the period of one year.

On the trial the plaintiff has shown the policy; the loss of the property by fire on the 9th day of January, 1868; the proofs of loss as required by the policy, and has also offered evidence to show the value of the building insured.

Therefore the plaintiff is entitled to recover, unless the defendant has established by the fair weight of evidence, one or more of the three defenses relied on to defeat the recovery.

To these defenses the court will now direct your attention, and these you will consider separately and in their order.

2. The policy, which is the contract between the parties, contains this agreement on the part of the plaintiff, to wit: "Any fraud or attempt at fraud or false swearing by the assured shall make this policy void."

If you find from the evidence that the plaintiff in the proofs of loss knowingly and falsely made a fraudulent over-valuation of the property with a view to deceive the insurance company, and to induce them to pay more than the value of the building, then he cannot recover, and you will, if you so find the facts to be, return a verdict for the defendant.

If you decide this issue for the defendant, this ends the case, and you need inquire no further. But if you determine this issue against the insurance company, then you will consider whether it has established its other defenses or either of them.

3. The policy contains this condition, viz.: "If any concealment or any erroneous representation, written or verbal, be made by the plaintiff concerning the risk," "it shall make the policy null and void."

The application signed by the plaintiff and introduced in evidence contains this question, to wit: "What encumbrances, liens, and mortgages are upon the property?" and said question appears on the face of the application to be answered, "None."

It is an admitted fact in the case that there was, at the date [446] of the policy, a subsisting mortgage on the property for the sum of three thousand dollars.

This is a complete defense to the action, and defeats the plaintiff's right to recover, unless the plaintiff shows (and on this point the burden of the proof is on the plaintiff) that the company is estopped to make this defense, or has waived the necessity on the part of the plaintiff, to make a disclosure of the existence of the mortgage.

The plaintiff does not claim, and has not testified that he informed the defendant's agent of the existence of the mortgage, and the agent who issued the policy distinctly testifies that he was not informed of the existence of the mortgage, and did not have any knowledge of the fact at the time he issued the policy. Having signed a paper which stated that there was no mortgage on the property, the law devolves on the plaintiff the necessity to make clear and satisfactory proof that this paper is not binding upon him.

If you believe from the evidence that Etheridge, the agent, before the application was signed, asked the plaintiff the question, "whether there was any mortgage on the property," that the plaintiff understood the question, and answered "no," then (under the admitted facts of the case), the plaintiff's right to recover is defeated, and you will find a verdict for the defendant.

The plaintiff's name appearing to the application, he is concluded thereby, unless the same is not binding, because the agent of the company deceived the plaintiff as to the nature and character of the paper which the plaintiff signed, or caused the plaintiff to sign it in ignorance of its contents, and upon his assurance that it was all right.

The plaintiff's claim respecting the application and statement about mortgages is, that the facts are these, viz.: That the agent of the company filled up the application in the absence of the plaintiff, and without his knowledge or authority; that the application, together with the policy, was brought to the plaintiff by the agent; that the plaintiff is a German, and ^[447] cannot read English print or writing; that it was not read by or to the plaintiff; that the agent assured the plaintiff that all was right; that plaintiff relied on this assurance; that plaintiff signed it without knowing or being apprised of its nature or contents, and supposing it was a receipt or paper obligating the plaintiff to pay the premium for which the agent had agreed to give a credit; that no inquiries were made by the agent of the plaintiff about encumbrances, and that the plaintiff did not purposely conceal or mislead the agent as to the mortgage, but was mislead by the agent's acts or statements so that he did not know what he was signing. Now, if these facts are proved, the company is affected by the said acts and conduct of the agent, and the statements in the application in relation to the mortgage cannot be set up by the company to defeat a recovery on the policy.

The law presumes that the plaintiff understood the nature of the paper he signed, and does not presume that a fraud was practiced upon the plaintiff in respect to the application, and hence the facts relied on by the plaintiff to avoid the application and the statements therein contained as to mortgages, must be clearly and satisfactorily established by the plaintiff.

If you decide the preceding defenses against the defendant you will proceed to consider the next defense, viz., an over-insurance contrary to the terms of the policy.

3. The policy in suit is for one thousand dollars, issued by the International Insurance Company, dated August 1, 1867. At the same time it is admitted that the plaintiff procured an insurance on the same building in the Home Insurance Company for five hundred dollars.

In the policy in suit the plaintiff was allowed to make five hundred dollars additional insurance; and it also contains the following condition, viz.: "If the assured shall have, during the continuance of this policy, any other contract of insurance

on the property not consented to by this company, and indorsed on the policy, the policy shall be null and void."

It is an undisputed fact in the case that on the 1st day of [448] October, 1867, the plaintiff obtained, on the property in suit, in the Enterprise Insurance Company of Cincinnati, a further insurance of five hundred dollars. By this last-named policy "one thousand five hundred dollars additional insurance was allowed" on the building, which was the amount insured by existing policies in the defendant's company (the International), and in the Home Company.

Thus the defendant had in all insured on the building two thousand dollars. This is five hundred dollars in excess of the amount allowed by the policy sued on, and this avoids the policy and defeats the plaintiff's right to recover if the company has not waived, or is not estopped to make this defense.

It is an admitted fact that the policy in suit, also the Home policy issued at the same time, and also the Enterprise policy, were issued by the firm of Etheridge & Powell, local agents of these companies. It is also stated by Etheridge, as a witness on the stand, and not contradicted or disputed, that he was at the date of the policy in suit, and at the date of the Enterprise policy, and still is the local agent of the defendant (the International Company), and that as such agent he has power to issue and to cancel policies and to change the terms and conditions thereof.

If, under these circumstances, you find the fact to be that the said Etheridge, or Etheridge & Powell, the local agents of the defendants, at the time they issued the Enterprise policy, knew of, and had in mind the policy in suit, and also the Home policy, and the conditions thereof as to the amount allowed therein to be insured by the plaintiff on the property, these circumstances will, in my opinion, amount in law to a waiver of the condition of the policy in suit as to over-insurance, and at all events they will estop the defendant to make this defense of over-insurance. (*Viele v. Germania Insurance Co.* 26 Iowa, 10; *Rowley v. Empire Insurance Co.* 36 N. Y. 550; *Bartholomew v. Ins. Co.* 25 Iowa, 507.)

It will be for the jury to say whether the words in the Enterprise Insurance Company's policy "one thousand five hundred

dollars additional insurance ^[449] allowed on the same building," had reference to the policy issued by the defendant for one thousand dollars, and to the policy issued at the same time by the Home Company for five hundred dollars, making the sum of one thousand five hundred dollars. If these words referred to these policies, it is almost needless to observe to you that the agent who inserted them, both knew of and had in mind those policies and their conditions as to the amount the plaintiff was allowed to insure.

Foreign insurance companies are from necessity compelled to act by agents; those who do business with them must necessarily deal with agents; sound public policy, protection to the citizen, require that these companies be bound by the acts and conduct of their agents done within the scope of their apparent powers, when the assured knows of no limitations on such powers. As the local agent might by contract indorsed on the policy have waived the condition as to amount to be insured, he may by acts and by course of dealing do that which amounts to such a waiver — may dispense with this condition and with the requirement that such waiver or dispensation shall be in writing indorsed on the policy.

Do not, gentlemen, infer that the court intends any disparaging allusion to the defendant or the acts of its agents in this case. Indulge or entertain no prejudice against the defendant, because it is an insurance company or a foreign corporation. It has the same rights and should receive the same measure of justice as if a citizen of this State or one of your neighbors were the defendants. It would be a reproach to the law and to the trial by jury if it should be true that the verdict depends, not upon the law and the evidence, but upon the character of the parties.

The jury found for the defendant upon the defense of the non-disclosure of the mortgage.

[NOTE.—During the same term, June, 1870, and before the same judges, the cause of the same plaintiff against the Enterprise Company on the policy above mentioned was tried. The main defense was an alleged concealment by the assured at the time of effecting the insurance of a previous sale of the property insured, under a mortgage.

[450] Respecting the necessity of a disclosure by the applicant of the existence of such a fact, and what acts on the part of the local agents of the company would

amount to a waiver of the necessity of making such disclosure, the jury was directed as follows:—

DILLON, *Circuit Judge*.—The principal defense relied on is that the plaintiff, in effecting the insurance, concealed the fact that there was an encumbrance on the lot and building to the amount of about three thousand dollars, at the time the policy in suit was issued. It is not denied that in point of fact there was a mortgage of this amount upon the property. There is no proof that the defendant or its agent knew of the existence of this encumbrance when the policy was delivered to the plaintiff.

In the application (which is made part of the policy and a warranty on the part of the plaintiff) the question as to mortgages or encumbrances is *not answered*. In the application there is printed over the signature of the plaintiff the following, to wit: "The applicant (the plaintiff) hereby covenants and agrees with the said company that the foregoing is a just and true exposition of the facts and circumstances in regard to the condition, situation, and value of the property insured, so far as the same are known to the applicant, and material to the risk." In the policy there is this provision, to wit: "If the assured conceals any fact material to the risk in the application or otherwise," this will avoid the policy.

It is admitted that on September 24, 1867 (prior to the date of the policy in suit), the property was sold on the mortgage before mentioned by virtue of a power of sale contained therein, and purchased by a third party. But under the statute of Minnesota, the purchaser at such sale did not acquire a title to the property; the title still remained in the plaintiff, and no title would pass to the purchaser unless the plaintiff failed for one year to redeem the property; in other words, notwithstanding the sale, the mortgage was still nothing but an encumbrance at the date of the policy sued on, October 1, 1867.

It was the duty of the owner of property, the title to which was in this condition, on applying to have it insured, to disclose to the company the facts relating to the state of the title, as, if not redeemed, the title would be lost to the assured before the expiration of the policy.

In contracts of insurance good faith and fair dealing are required from both parties; such good faith and fair dealing would ordinarily require the party proposing to get the property insured to disclose the state of the title, if it was in the condition above mentioned.

The question in the case at bar is whether the necessity of such disclosure was waived by the company. If you find from the evidence that the plaintiff's property had been insured before in companies represented by the defendant's local agent; that such insurance being about to expire, the defendant's local agent applied to the plaintiff to keep the property insured, and to allow such agent to insure it in the defendant's company; that the plaintiff consented; that the agent of the defendant made out, or [451] caused the application to be made out, in the office, and in the absence of the plaintiff; that when made out, it and the policy already filled up and signed were taken to the plaintiff's store; that the application was not read to the plaintiff, and that he could not read it, being a German, and that it was not read or explained to him by the agent; that the agent said it was all right, and the plaintiff signed it without being appraised of its contents; and if you further find that at no time were any inquiries made of the plaintiff respecting encumbrances,—the court instructs you (if you find these to be the facts) that they amount in law to a waiver on the part of the defendant of the duty on the part of the plaintiff to disclose the existence of the mortgage or encumbrance on the property. If these are not the facts, substantially, then you will find that it was the duty of the plaintiff to have disclosed the state of the title, and failing to do which he cannot recover."

Respecting the *waiver of conditions* in policies, and the *power of local agents* in this respect, the case of *Viele v. Germania Ins. Co.* 26 Iowa, 9, and the note, may

be usefully consulted. (*Ins. Co. v. Throop*, Michigan supreme court, 1871; *Miner v. Ins. Co.* 26 Wis. not reported.)

Agent in filling up blank applications may be the agent of the company. (*Rowley v. Ins. Co.* 36 N. Y. 550; *Miller v. Ins. Co.* 30 Iowa.)

The principle laid down in the foregoing charge as to knowledge of an agent acquired in other transactions, has since been approved by the supreme court of the United States. *The Distilled Spirits*, 11 Wall. 358.]

Fraudulent Representations by Assured avoids policy of insurance. — Followed, *Wilkinson v. Union Mut. F. L. Co.* 2 Dill. 572; *Shaw v. Scottish Com. Ins. Co.* 1 Fed. Rep. 765.

UNITED STATES v. FLYNN.

CRIMINAL LAW — SALE OF LIQUOR TO INDIANS.—Under the Act of Congress of March 15, 1864 (13 U. S. Stats. 29), prohibiting the sale of liquor to any Indian under charge of an Indian agent, actual control, or immediate personal superintendence by such agent over the individual Indian to whom the liquor is sold, is not essential, if the tribe to which the Indian belongs is under the charge of such agent, and the Indian himself still maintains his tribal relations.

Before DILLON, J., and NELSON, J.

It is provided by the Act of Congress of the 15th day of March, 1864 (13 U. S. Stats. 29), that "if any person shall sell . . . or dispose of any spirituous liquors to any ^[452] Indian, under the charge of any Indian superintendent, or Indian agent appointed by the United States," he shall be punished, etc., as provided by the act. Legislation of this character has been held by the supreme court of the United States, to be constitutional, and authorized by the power of Congress to regulate commerce with the Indian tribes. (*United States v. Holliday*, 3 Wall. 407; *United States v. Haas*, 3 Wall. 407.)

The evidence shows that the Indian named in the indictment belongs to one of the bands of the Chippewa tribe of Indians, residing in the State of Minnesota; that the Indian to whom the liquor was sold still maintains his tribal relations, and receives his annuities from the United States; that the tribe to which the Indian belongs is regularly under the charge of an agent appointed by the United States. But the evidence also shows that the Indian named in the indictment has not for two years, or thereabouts, resided on the reservation occupied by the tribe, but has been for that period living away from the tribe, and off the reservation.

Under these facts, the question arises whether the Indian named was, within the meaning of the act of Congress "*under the charge of an Indian agent*" at the time when the liquor is alleged to have been sold to him.

PER CURIAM (DILLON, J., and NELSON, J., concurring). — It was held upon these facts, that the Indian to whom the liquor was sold was under charge of an Indian agent within the meaning of the act of Congress, and that actual charge and immediate personal superintendence over the individual Indian by the agent, at the time, was not essential to maintain the indictment. This conclusion was considered to be supported by the nature of the previous legislation on the same subject, by the policy of such legislation as declared in the cases above referred to (3 Wall. 407), and by the principles settled by the decisions in those cases.

C. K. Davis, District Attorney, for the United States.

Mr. Heard, *contra*.

[453] HAWKINS, ASSIGNEE, v. HASTINGS NATIONAL BANK.

BANKRUPTCY — APPEALS IN EQUITY CASES — HOW TAKEN. — Appeals in equity cases, under the bankrupt act, from the district to the circuit court, are regulated by section 8, and general order 26 in bankruptcy, framed by the supreme court; and where, in an equity case, the record did not show that an appeal was claimed, or notice given, and contained no bond, it was dismissed by the circuit court.

Before MILLER, J., and DILLON, J.

THIS was an appeal from the district court. In that court a bill was brought by the complainant, as assignee in bankruptcy, to set aside a mortgage made by the bankrupt to the respondent, and for an injunction to prevent proceeding under the mortgage. The ground of the bill was that the mortgage is void because made in fraud of the bankrupt act.

A motion was made to dismiss the appeal from the decree of

the district court; and the general question was how cases of this kind should come from the district court to this court; and if by appeal, what steps are necessary.

Section 8 of the bankrupt act provides that "Appeals may be taken from the district to the circuit court, *in all cases in equity*, but no appeal shall be allowed in any case from the district to the circuit court unless it is *claimed*, and *notice* thereof given to *the clerk* of the district court, to be *entered with the record* of the proceedings, and *also to the defeated party in equity* within ten days after the entry of the decree or decision appealed from."

As to appeals generally, see section 22 of the judiciary act, as modified by the Act of March 3, 1803 (2 U. S. Stats. 244), these being the leading statutes respecting appeals in equity in the courts of the United States.

The 26th general order in bankruptcy, framed by the supreme court, prescribes that "Appeals in equity from the district to the circuit court shall be regulated by the *rules* ^[454] *governing appeals in equity in the courts of the United States,*" etc.

C. K. Davis, for the Complainant.

Smith & Van Slyck, for the Defendant.

PER CURIAM (MR. JUSTICE MILLER delivering orally the opinion of the court). — Alluding to section 8 of the bankrupt act, part of which is quoted above, he observed, in substance, that it provided for a writ of error and for two classes of appeals. *One class* was appeals in *equity causes proper*, of which the district court was given jurisdiction in broad and plain terms by the first and second sections of the act. *The other class* of appeals related to controversies between creditors and assignees in relation to the allowance and rejection of *claims*, the procedure on appeal, in this class, when taken by the creditor, being further regulated by section 24. This provision as to appeal is anomalous, since the general legislation at Congress discriminates between writs of error and appeals; but within this class the present cause does not fall.

The bill filed by the assignee makes a case confessedly of equity cognizance, and comes within the class of appeals first mentioned.

Section 8 of the bankrupt act and general order 26 apply to it. Such a case must come into this court by appeal, and not by writ of error, and the appeal must be claimed and notice given as in other cases. In this case, the record does not show that any appeal was claimed or allowed, or any notice or security given. The motion to dismiss the appeal is therefore sustained.

DILLON, C. J., concurs.

Motion sustained.

[455] [NOTE. Construction of section 2 and section 8 of bankrupt act: *Ruddick v. Billings*, 1 Woolw. 830, and note of reporter; *Morgan v. Thornhill*, 11 Wall. 65; *Ex parte Alexander*, 8 Am. Law Reg. (N. S.) 428, decided by Chase, C. J.; *Langley v. Perry*, 8 Am. Law Reg. (N. S.) 427, decided by Swayne, J.; *York's Case*, 1 Abb. U. S. Rep. 508; *In re Hall*, post.]

Appeals in Equity Cases in Bankruptcy.—How taken.—Cited *In re Hall*, post, 586.

LARRIVIERE v. MADEGAN.

PUBLIC LANDS—LOCATION EQUIVALENT TO PATENT.—The location of land with scrip, under and in compliance with the Act of Congress of July 17, 1854, passed the fee out of the United States and was equivalent to a patent.

EJECTMENT—EQUITABLE TITLE.—In ejectment the defendant cannot, in the courts of the United States, set up an equitable title.

Before NELSON, J.

THE facts necessary to understand the questions of law decided appear fully in the opinion of the court.

W. W. Phelps, for the Plaintiff.

S. L. Campbell, for the Defendant.

NELSON, *District Judge*.—This is an action of ejectment. The property involved is the northeast quarter of southeast quarter of section nine (9), township one hundred and ten (110), west of range ten (10), containing forty acres of land according to the government survey, situated in what is known as the "Half Breed Tract," in the State of Minnesota. The title is claimed by the plaintiff by virtue of a scrip location, under the

Act of Congress of July 17, 1854, and by the defendant, by virtue of a pre-emption entry conferred under the Act of Congress of May 19, 1858, which is amendatory of the preceding act.

A special verdict was taken. It appears from this verdict that the plaintiff was a half-breed Sioux, and a beneficiary under the treaty of Prairie Du Chien made in July, 1830.

[456] The ninth article of this treaty reads as follows: "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the half-breeds of their nation the tract of land within the following limits, to wit: Beginning at a place called the Varn, below and near the village of the Red Wing Chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty-two miles, to a point opposite Beef or O-Beuf River; thence fifteen miles to the grand encampment opposite the river aforesaid: the United States agree to suffer said half-breeds to occupy said tract of country, they holding by the same title, and in the same manner that other Indian titles are held." (7 U. S. Stats. 330.) In July, 1834, Congress passed an act authorizing the President to exchange with half-breeds, beneficiaries of the foregoing treaty, for the tract of land described above, giving each of said half-breeds certificates or scrip for the same amount of land each would be entitled to in case of a division of the reservation, *pro rata*, among the claimants, upon a full and complete relinquishment to the United States of all their right, title, and interest to the said tract of land. "Which said certificates or scrip [in the language of the act] may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breed or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements, provided," etc.

In accordance with the provisions of this act of Congress, the plaintiff, on the 27th of March, 1857, executed a relinquishment of his right, title, and interest in and to the said reserva-

tion, and received his certificate or scrip, and on the 11th day of August, 1857, at the Faribault land office, located scrip No. 87, B, for forty acres, upon the property in dispute, ^[457] fully complying with the instructions of the general land office.

On the 19th day of May, 1858, Congress passed an act amendatory of the Act of July 17, 1854, as follows: "The Act of July 17, 1854, is hereby amended, so that the body of land known as the Half Breed tract, lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, and which is authorized to be surveyed by the said Act of 1854, shall be subject to the operation of the laws regulating the sale and disposition of the public lands; and settlements heretofore made thereon are declared valid, so far as they do not conflict with settlements made by half breeds; and that the settlers shall have the benefit of the pre-emption laws of the United States, any location of half breed scrip thereon after the date of the settlement, notwithstanding, provided," etc. (11 U. S. Stats. 292.)

The defendants settled upon the land located by the plaintiff on the 8th day of October, 1855, and under the Act of May 19, 1858, effected a *pre-emption entry* on the 2d day of June, 1859, of the southeast quarter of section (9), township one hundred and ten (110), range ten (10), west, which embraced the forty acre tract aforesaid, and now claims a superior title to the plaintiff.

The principles involved in this case are not new. They have frequently engaged the attention of courts, and have been fully decided. The location of the land with the scrip, under the Act of Congress of July 17, 1854, passed the fee out of the United States, and vested it in the plaintiff as grantee. The scrip and application became the "instruments of title," and conferred upon him the *legal* title as effectually as could have been done by the issuing of a patent.

The defendant sets up an *equitable* title only, to wit: a certificate of a pre-emption entry. In actions at law the legal title must prevail, and the equities of the parties cannot be inquired into. The location with the scrip, being, in my opinion, equivalent to a patent, gives a better title than the ^[458] pre-emption entry. (See 13 Peters, 516; 20 How. 566; 11 How. 568; 13

How. 24; 2 Johns. 84, 222.) These authorities settle this case, as no equitable title can be set up in ejectment in opposition to the legal estate.

Judgment upon the special verdict is therefore given for the plaintiff.

Judgment accordingly.

THOMPSON v. SMITH ET AL.

EQUITY — WRIT OF ASSISTANCE. — The power of a court of chancery to put the purchaser of the mortgaged premises into possession by a writ of assistance, or summary proceedings, extends only to the parties to the suit and those coming in under them after suit commenced, and does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative, by statute.

Before NELSON, J.

The facts are sufficiently stated in the opinion of the court.

Morris Lamprey, for the Complainant.

Greenleaf Clark, for the Defendant.

NELSON, *Circuit Judge*. — An application is made by petition, to modify a writ of assistance, granted to put the complainant into possession of the mortgaged premises. The writ of assistance was issued by the clerk, not only against the mortgagor and T. R. Fletcher, defendants in the suit, but also against the wife of the mortgagor, who was not a party to the suit, but who lived upon the premises with him. This application is made in behalf of the wife, Mary T. B. [459] Smith, who claims the possession of the mortgaged premises under color of title derived from one of the defendants, prior to the commencement of the suit for a foreclosure.

It is a well-settled rule, founded in reason and justice, that the power of a court of chancery to put a purchaser of the mortgaged premises into the possession, by a summary process, extends only to the parties to the suit, or those coming into the

possession, under the parties to the suit, subsequent to the commencement of the same. If, therefore, Mary T. B. Smith was in the possession of any portion of the mortgaged premises, prior to the commencement of the foreclosure suit, she cannot be dispossessed by this summary proceeding. She is capable of acquiring, by purchase, or otherwise, real property, and holding the title to the same, under the laws of the State of Minnesota.

Now, the evidence offered upon the hearing of the motion clearly establishes the fact that she was in possession of these premises, prior to the commencement of suit, under color of title, and this evidence is not controverted by the purchaser at the master's sale. Her possession is not denied, but it is alleged that her right to that possession is not valid, the deed under which she claims being void or inoperative by statute, as against the mortgagee and purchaser. This raises a question of title which cannot be disposed of in this summary proceeding. The purchaser must seek the usual remedy for settling such questions.

The writ of assistance is modified, and all proceedings stayed, so far as Mary T. B. Smith is concerned.

Writ modified.

[400] THE HARDY.

ADMIRALTY JURISDICTION — MARITIME CONTRACTS. — A contract by which a steamboat navigating the public inland waters of the United States engages in consideration of freights to be earned, to carry certain goods and collect from consignee the freight money, charges, advances, and insurance, together with the price of the goods, and after deducting the freight money to pay the balance to the consignor, is a maritime contract, within the jurisdiction of the district court, in admiralty, and is a contract within the scope of the master's authority, and binding on the owners of the vessel in favor of a shipper, who had no knowledge that the boat was already chartered for the use of others.

In this case, which was a libel *in rem*, in the district court, against the steamboat *Hardy*, a written opinion was delivered in which it was held, by —

NELSON, *District Judge*. — 1. That a contract by which a steamboat navigating the public inland waters of the United States, engages, in consideration of freights to be earned, to carry for the libellant certain goods, and collect from the con-

signee the freight money and all charges, advances, and insurance on the goods, together with the price thereof, and after deducting the freight money, to pay to the libelant the balance, is not unusual in its character, and is essentially a contract for a maritime service, of which the district court has jurisdiction in admiralty, in a proceeding *in rem* against the boat.

2. That such a contract is within the scope of the master's employment, and is binding upon the owners and the vessel, in favor of a shipper who has no knowledge that the boat was at the time chartered by parties to be run for their own use and benefit.

Harvey Officer, for the Libelant.

Smith & Gilman, for the Claimants.

[NOTE. — See *Monteith v. Kirkpatrick*, 3 Blatchf. 279. *Criteria* of admiralty jurisdiction as to torts and contracts: *Insurance Co. v. Dunham*, 11 Wall. 1; *Mollie Dozier*, 24 Iowa, 192; *The Moses Taylor*, 4 Wall. 411; *The Ad Hine*, 4 Wall. 555; S. C. 1 West. Jur. 231, and note of learned annotator.]

Master Has Power to Bind Ship in scope of his authority only. — Distinguished, *The Josephine Spangler*, 11 Fed. Rep. 441. Questioned, *The Illinois, White & Cheek*, 2 Flap. 426.

DRURY v. FOSTER.

ACKNOWLEDGMENT — CONCLUSIVENESS OF. — The facts stated by the officer in the certificate of acknowledgment of a deed or mortgage is not conclusive under the statute of Minnesota.

MARRIED WOMEN — ACKNOWLEDGMENT — FILLING BLANKS. — In Minnesota due acknowledgment is necessary to bar dower, or enable a married woman to convey her real estate, and a deed void when acknowledged by reason of containing blanks cannot be ratified except by a reacknowledgment of the instrument.

IN this cause, which was a bill filed by the mortgagee, Drury, in 1863, to foreclose a mortgage made by the defendants, Foster and wife, the defense was, in substance, that the [461] mortgage, when executed and acknowledged, contained several material blanks, which were afterwards filled up without the knowledge of the wife, who never assented to or ratified the instrument as thus perfected.

As to *acknowledgments*, the statute of the State provides: "All

conveyances, etc., which shall be acknowledged may be read in evidence without further proof, but the effect of such evidence may be rebutted by other competent testimony." (Comp. St. ch. 35, § 26, 400.) As to conveyances, the statute provides that "A married woman may bar her right of dower in any estate conveyed by her husband by joining in the deed of conveyance, and acknowledging the same, as provided in the preceding chapter." (Comp. St. ch. 36, § 13, 408.)

An elaborate opinion was delivered (afterwards affirmed by the supreme court of the United States, *Drury v. Foster*, 2 Wall. 24), in which it was held (dismissing the bill as to the wife) by —

NELSON, *District Judge*. — 1. Under the statute of Minnesota, above copied, a certificate of the officer as to the due acknowledgment of a deed or mortgage is not *conclusive*; and parol evidence may be received to show that when the instrument was executed and acknowledged by the wife, there were material blanks left therein, which were afterwards filled up.

2. Under the statute of Minnesota, above mentioned, a married woman can pass her real estate or bar her dower only by executing and acknowledging the deed; and a deed void when acknowledged by the wife by reason of containing material blanks, cannot be ratified by subsequent consent on her part, unless given in accordance with the statute, viz.: by a reacknowledgment of the instrument.

Greenleaf Clark, and *Henry Hale*, for the Complainant.

James Gilfillan, for the Respondent.

[462] [NOTE. — As to effect of subsequently filling blanks in conveyances: See *Simms v. Hervey*, 19 Iowa, 274, and cases cited and classified; *Owen v. Perry*, 25 Iowa, 412. As to controverting certificate of acknowledgment: *O'Ferrall v. Simplot*, 4 Iowa, 381; *McHenry v. Day*, 13 Iowa, 445; *Morris v. Sargent*, 18 Iowa, 19; *Dodge v. Hollingshead*, 6 Minn. 25, followed in *Edgerton v. Jones*, 10 Minn. 427, which held with JUDGE NELSON, that under the statute of Minnesota the facts stated in the certificate of acknowledgment are not conclusive.]

HAWKINS v. HASTINGS BANK.

MORTGAGE OF CHATTELS — MINNESOTA STATUTE CONSTRUED. — The statutes of Minnesota do not require a mortgage of chattels to be under seal, and such a mortgage executed under seal by one partner in the name of the firm, for money advanced to the firm, the other partner having subsequently given his parol assent thereto, is valid, and binds the firm.

BANKRUPTCY — CHATTEL MORTGAGE — FRAUD. — A clause in a chattel mortgage by which the mortgagors were constituted the agents of the mortgagees, to dispose of the goods, and account for their proceeds, with no right or power to sell for their own use, is not inconsistent with the statutes of the State of Minnesota (R. S. 326, § 1), and does not render the mortgage fraudulent on its face.

Before NELSON, J.

THE plaintiff is the assignee in bankruptcy of the Messrs. Sproat; the defendant is the First National Bank of Hastings. The controversy concerns the validity of a certain chattel mortgage, made by the bankrupts (under the circumstances mentioned in the opinion of the court) to the bank.

The other facts are sufficiently stated in the opinion.

C. K. Davis, for the Plaintiff.

L. Van Slyck, for the Defendant.

NELSON, *District Judge*. — The mortgage is fair and valid upon its face. It is executed under seal by one partner, in the name of the firm, the co-partner having subsequently ^[463] given his parol assent thereto. There is nothing in the statutes of this State requiring such an instrument to be under seal, and the fact that a seal is attached does not change its character or effect. (1 Met. 515, and cases cited.) Indeed, if a seal was necessary to the validity of such an instrument, we are satisfied that the rigid common-law rule has been relaxed, and the doctrine fully sustained by modern decisions, that one partner can bind the firm by an instrument in writing under seal, when both are interested in the transaction, if there is a previous parol authority, or a subsequent parol assent to the act. (4 Met. 548; *Smith v. Kerr*, 3 Comst. 144; 4 Term Rep. 313; *Kinner v. Dayton*, 19 Johns. 513; 11 Pick. 400.)

The consideration (\$6,000) was advanced at the time the mortgage was executed, and credit was given upon the bank

check book for the amount, less interest and stamps, and although some past due paper, held by the bank against the mortgagors and their father, was paid, I do not think there was anything in this particular branch of the transactions to indicate unfairness or dishonesty. The conditions of the mortgage are a little out of the ordinary terms of such instruments, but as the consideration was a present one, and the money received was immediately appropriated to the payment of actual indebtedness to other creditors, to an amount nearly equal to the consideration expressed, the instrument is not necessarily void, on that account. The stipulations which are pressed by counsel, as indicating fraud *per se*, are as follows: "And it is further agreed between the parties hereto, that until said sum of \$6,000 and interest shall be paid, the said parties of the first part shall remain in possession of said goods, as the agents of the party of the second part, and shall well and truly account to the said party of the second part, or their assigns, monthly, for all sales made by them, of the aforesaid property, hereby mortgaged, until said sum of \$6,000 shall be fully paid and satisfied, the intention of the parties to this mortgage being that the sale of ^[464] the property herein specified be absolute to the said party of the second part, until said indebtedness shall be fully paid, with interest; *said parties of the first part only acting as the agents of the said party of the second part, in disposing of the goods hereinbefore mentioned, and accounting for the proceeds thereof, until said indebtedness is paid.*" These conditions do not render the mortgage void upon its face; if carried out in good faith, they certainly would not hinder, delay, or defraud creditors. The object, as expressed, was to subject the mortgaged property to the payment of the loan. This is the legitimate purpose of securities of this character, and as the mortgagors had the control of the stock of goods, there being no actual and continued change of possession, they could only rightfully dispose of it for the purpose of liquidating the secured debts. They could not sell for their own use; this would have been a fraud upon creditors, and if such permission was given by the terms of the instrument, or agreed and consented to by parol, the mortgage would be void. (4 Minn. 533; 17 Wend. 492; 9 N. Y. 213; 13 N. Y. 577; 19 N. Y. 123; 2 Hillard on Mort-

gages, and cases cited.) The possession of the mortgagors is explained by the very terms of the instrument, and is not inconsistent with good faith, within the meaning of section 1, page 326, R. S. Minn., title "Fraudulent Conveyances and Chattel Mortgages." The mortgagees, however, must be bound by the agreement which they have entered into. They have created the mortgagors their agents, and authorized them to sell the mortgaged property, and account monthly for the proceeds, until the debt is paid. So far as creditors are concerned, the relation of principal and agent must be sustained. The acts of the mortgagors, within the scope of their agency, must be regarded as the acts of the mortgagees, and proceeds of all sales made must be credited *pro tanto* towards extinguishing the debt. (28 N. Y. 360.) The remaining property, or its proceeds, must go into the hands of the assignee. The books of the bank showed that the deposits made by the mortgagors, ^[465] after the execution of the mortgage, and before they were closed up, exclusive of the \$6,000 loan which had been placed to their credit, amounted to \$5,251.62; and although there is no direct testimony that these deposits were from the proceeds of the sales of this stock of goods, I think the presumption is strong that such was the case, as they were made in small amounts, from day to day, running through a period of nearly two months. However, the mortgage debt, in my opinion, would be extinguished, provided the sales, during the time the mortgagors were in possession, amounted to the debt and interest.

We shall refer the matter to a master and examiner, to take an account and ascertain the amount of sales, giving the mortgagee, in his report, a decree for the deficiency, if any should be found.

Ordered accordingly.

WARE v. ST. PAUL WATER COMPANY.

NUISANCE FROM DEFECTIVE STREETS—LIABILITY.—The author of a dangerous nuisance on the public streets of a city is liable for the damages it occasions, as well as the city corporation.

ID.—MUNICIPAL CORPORATION—CONTRACTOR.—Where a person or corporation is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, there is a liability on the part of the person or corporation doing the work for injuries resulting from carelessness or negligence, though the work be done by a contractor, and though the contractor be not an unskillful or improper person.

ID.—NEGLIGENCE—REASONABLE CARE.—Where in such cases, the work is a lawful undertaking, the jury must be satisfied that the plaintiff was using reasonable care, and that the defendant was negligent.

Before NELSON, J.

THE plaintiff was thrown from his buggy and injured, while driving upon a street, in which the defendant, through a contractor, was blasting, and using a steam drill for making [408] trenches for pipes. He claims that the injury was the result of negligence on the part of the defendant. The issue was tried before a jury.

NELSON, *District Judge*, charged the jury. This action is brought against the defendant to recover damages for an injury to the plaintiff, on one of the streets of the city of St. Paul, in July last. There is no doubt about the fact of the injury having been suffered by the plaintiff; both bones of his leg below the knee were broken, as was testified to by the attending surgeon. This action is brought upon the principle, which is pretty well settled in this country, at least so far as the federal courts are concerned, that where "a person (company or corporation included) is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness and negligence, though the work may be done by a contractor." (*Chicago v. Robbins*, 2 Black, 418; 4 Wall. 658, and *American Law Register*, vol. 9, No. 9.) Although the plaintiff might have sustained an action against the city, it is his right to seek his remedy against the party who created the nuisance, and the case is not altered from this fact.

The defendant claims that it cannot be held liable for any negligence of the contractor or his employees, unless it appears that an unskillful or improper person was employed as contractor. While we admit that such a rule of law might apply in some cases, we are of opinion that this case is not of that class. Early in the history of cases of this character it was the settled law that the "owner of land was liable, at all events, for the negligence of employees in doing work, whether there was an intermediate contractor or not. Subsequent decisions restricted the application of this rule until at last it was held by very able and learned judges that the relation of principal and agent, or master and servant, must be established in all cases before any responsibility could be fixed upon the person who authorized the work. The principle, however, upon which this suit is sought to be maintained, soon became ^[467] an exception to this rule. The plaintiff, however, must satisfy you, if the work was a lawful undertaking, that there was reasonable care and prudence on his part, as well as negligence on the part of the defendant. If the work was not authorized to be done, he would be required to show reasonable care for his personal safety only. The defendant, however, in this case, by its charter, as well as by an ordinance of the city, was authorized to prosecute this work in excavating and laying water pipes through the streets. It was a public improvement necessary to be done, and though the streets were more or less obstructed in digging trenches and operating steam drills in the rocks underlying the street, still the public must yield the enjoyment of a free and unobstructed passage for such reasonable time as might be required to perfect the work. The defendant cannot relieve itself from the duty of exercising care and diligence for the protection of the public, because the improvement was a necessity. It is said, "necessity justifies actions that would otherwise be nuisances. Yet unless prudence and care be exercised, they become nuisances, and can be abated." It is no argument against the prosecution of this work that it is a hazardous undertaking, and requires the use of dangerous implements and material in its prosecution. The more hazardous the work, the more dangerous the machine used, the greater became the duty of the defendant to exercise extraordinary precaution.

There was some evidence given which tended to show that the plaintiff, when driving rapidly down the street in which pipe was being laid, suddenly urged his horse with the whip, and turned the corner into a side street, after passing all of the obstructions, and at a time when the steam drill was not in operation, and work was virtually suspended, and in so doing struck the curb, which overturned the buggy and produced the injury. If you believe that such was the fact, and that the injury did not result from the want of care on the part of the defendant, there is an end of the case, and the plaintiff cannot recover. And if, rejecting this theory, you are ^[468] satisfied that at the time of, and preceding, the injury, the persons engaged in doing the work and having charge thereof, used the care and precaution to prevent injury to others, which ordinarily prudent persons would use under like circumstances, then the plaintiff cannot recover; or, if you are satisfied that the plaintiff did not use all the care to avoid danger or injury, which ordinarily prudent persons would use under like circumstances, and his neglect to use such care contributed to bring the injury on himself, then defendant is entitled to a verdict; or, if you believe that there was culpable negligence on the part of the plaintiff as well as on the part of the defendant, the defendant should have a verdict. But if you believe that the negligence of those doing the work was the cause of the injury, and that the plaintiff was exercising all reasonable care for his personal safety, you will return a verdict against the defendant. These are questions of fact for your determination, and you must decide them according to your best judgment.

If you think the plaintiff is entitled to recover, you will next consider what amount of damages is due him. The following general rule, which, I believe, is settled, will govern your action. The party aggrieved is entitled to recover not only actual expenses, including medical attendance, but also a reasonable compensation for mental and bodily suffering, loss of time, and for any permanent or incurable injury inflicted. The damages must be strictly compensatory.

The jury found for the plaintiff.

C. K. Davis, for the Plaintiff.

Allis, Gilfillan & Williams, for the Defendant.

[NOTE.—That the author of nuisance on the streets is directly liable to the person injured, or liable over to the municipal corporation. (*Milford v. Holbrook*, 9 Allen, 17; *Wood v. Mears*, 12 Ind. 515; *Ball v. Armsirong*, 10 Ind. 181; *Congreve v. Smith*, 18 N. Y. 79, 84; *Littleton v. Richardson*, 82 N. H. 59; *Clark v. Fry*, 8 Ohio, 359; *Bush v. Johnston*, 23 Pa. St. 209.) Effect of judgment against city corporation on the liability of the author of nuisance. *Littleton v. Richardson*, 84 N. H. 179; *Chicago v. Robbins*, 2 Black, 418; *Milford v. Holbrook*, 9 Allen, 17; *Portland v. Richardson*, 54 Me. 46; *Veazie v. Railroad Co.* 79 Me. 119.]

Judgment Affirmed on appeal, 16 Wall. 566.

[469] UNITED STATES *v.* CITY OF DULUTH ET AL.

INJUNCTION — UNITED STATES MAY PROTECT IMPROVEMENTS ON RIVERS BY. — The United States may bring an injunction bill, in the proper circuit court, to protect improvements, which she is making under the authority of Congress, in navigable waters, from injury which will be caused by works of internal improvement within State limits, and by State authority. The power of the federal government, when called into exercise, is, in such cases, not only paramount but exclusive, and cannot lawfully be interfered with to any extent.

RESPECTIVE POWERS OF NATIONAL AND STATE GOVERNMENTS OVER NAVIGABLE WATERS. — Whether the work prosecuted under State authority will have the effect to interfere with that prosecuted under the federal authority, is a question of fact upon which the opinions of the government engineers, while entitled to great consideration, are not conclusive.

Id. — TEMPORARY INJUNCTION. — Where the injury threatened is of a character not easily remedied, if the injunction be refused, and there is no denial that the act charged is contemplated, a temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted.

Before MR. JUSTICE MILLER, at Topeka, Kansas.

THE United States, by her attorney for the district of Minnesota, who acts under the direction of the attorney-general, brings this bill in chancery in the circuit court for that district, for an injunction against the defendants.

The facts stated in the bill are briefly these: That the government of the United States, by means of appropriations made by Congress, is making certain improvements at the mouth of the St. Louis River, intended to keep open and to deepen the channel at that point, between the western end of Lake Superior and the body of water called Superior Bay. This bay is separated from the main body of the lake by a narrow tongue of land, a few hundred yards in width, starting from the Minnesota shore

on the north, and projecting itself south toward the Wisconsin shore about six miles.

Between the southern extremity of this narrow strip of land, called Minnesota point, and the Wisconsin shore of the lake, the St. Louis River and the waters of Superior Bay make an [470] outlet into Lake Superior, and through the outlet or channel (for the St. Louis River here makes a current), vessels navigating the lakes, make their way to the harbor of Superior City, Wisconsin, and to the inner harbor of the city of Duluth. This latter city is situated in the State of Minnesota, at the upper end of Minnesota point, and has not only its harbor in Superior Bay, but has its wharf on the lake, where vessels receive and discharge their cargoes.

The improvements on which the United States have been at work for two or three years, are at the mouth of the St. Louis River, between the south end of Minnesota point and the Wisconsin shore, and, as the bill alleges, are intended to narrow the channel at that point, by piers on each side of it, that the body of water carried by the St. Louis River and the bay of Superior, through the channel, may be increased in velocity so as to deepen the channel and keep it free from the deposits which have a tendency to fill it up, and thus obstruct the entrance and exit of vessels into and from Superior Bay.

The bill then alleges that the defendants are engaged in cutting a canal across the upper end of Minnesota point, near Duluth, through which the waters of Superior Bay will flow into Lake Superior, and by which the current of the St. Louis River, now flowing through the outlet already described, will be diverted into the canal, and that the result will be to render ineffectual the efforts of the United States to protect and deepen the natural channel at the mouth of the St. Louis River, and to cause it to be filled up, so as to become incapable of navigation.

To prevent this result, the court is asked to enjoin the defendants from the further prosecution of work on the canal.

Mr. Davis, United States district attorney for Minnesota, with whom *Mr. Barlow*, attorney-general of Wisconsin, and *Mr. Spooner*, for the United States.

[471] *Mr. Cornell*, attorney-general for Minnesota, and *Mr. Masterson*, for the city of Duluth.

MR. JUSTICE MILLER. — While the defendants do not deny the right of the United States to come as a party plaintiff into her own courts, to seek protection for her own interests, they claim that the real plaintiffs in this suit are the State of Wisconsin and the city of Superior, while the United States are mere nominal parties, and that the proceeding is instigated by rivalry and jealousy, and has for its purpose the injury of Duluth by impeding the growth of her commerce, by checking the improvement of her harbor, to which the canal is essential.

Of all this the court can know nothing, judicially. The present suit was authorized by the proper officer of the government, namely: the attorney-general, and, in doing so, he appears to have acted on the request of the engineering bureau having in charge the work threatened with injury. This injury, if the allegations of the bill be true, is a direct interference by the defendants with the operations of the federal government in the improvement of the navigation of the lake at that point.

We cannot assume that the government of the United States, or its officers who bring this suit, are governed by a spirit of hostility to Duluth, nor can we make that the subject of inquiry on this occasion.

If the allegations of the bill be true, we have no doubt of the right of the officers of the federal government to bring this suit in the name of the United States, to protect her rights, and deem it a much more appropriate mode of doing so than by the physical force of the war department.

That the protection, improvement, and general control of the navigable waters of the United States are within the constitutional competency of Congress, there can be no doubt. This power has been so often asserted, both in Congress and in the supreme court, that reference to adjudged [472] cases would be an affectation of learning. No one has denied this for many years past, and it is not denied by counsel on the present occasion.

It is, however, asserted that the States have a concurrent right to authorize improvements on the navigable waters of the United States in which their citizens are interested, so far as

these waters lie within the territorial limits; and it is shown by affidavits, and by the statutes of Minnesota, that the canal here complained of is authorized by said State, and is important to her commerce, and is within her territory. That such a power can be exercised by the States may be admitted, when it does not injure the general interest of commerce, and when it does not conflict with any control assumed by the federal government over the same locality.

But all the reported cases which concede this power in the States agree that it exists only while the Congress of the United States refrains from the assertion of its authority, and that, when the latter is called into exercise, it is not only paramount but exclusive. Such is the principle asserted by the supreme court in *Crandall v. Nevada*, 6 Wall. 35, and in *Gilman v. Philadelphia*, 3 Wall. 713, and in *Cooley v. The Board of Wardens*, 12 How. 299, in all of which the question is thoroughly examined.

Nor can any doubts be entertained, from the facts before us, that the Congress of the United States has called into exercise the federal power in the improvement of the navigation between Lake Superior and Superior Bay. They have made appropriations for this purpose more than once, one of which is so recent as the month of March last, which is yet unexpended, and the mode of expending this money being confided by Congress to certain officers of the government, it must be held that whatever is done by them in furtherance of that purpose is done under the authority of Congress. It is, however, claimed that inasmuch as Congress, in the same bill which contains the last appropriation referred to, [473] also appropriated a like sum for the improvement of the harbor of Duluth, it is to be inferred that Congress thereby recognized the canal now complained of as a legitimate work.

In support of this view, reference is made to a joint resolution of the Minnesota legislature, in response to which it is claimed this latter appropriation was made. But we can draw no such inference from the action of Congress; for while that joint resolution does mention this canal, with other matters, as one mode of improving the Duluth harbor, and declares that the system under which Congress was seeking to improve the

entrance to Superior Bay (which was supposed to be as useful to Duluth as to Superior City) is a failure, it does not appear that Congress adopted these views, for it left both appropriations under the control of the engineer corps of the war department, which, both then and now, continue to assert that the work at the mouth of St. Louis River is the true mode of improving the entrance to Superior Bay, in which are the harbors of Superior City and of Duluth. We must hold, then, that this work is authorized by the Congress of the United States, and is prosecuted under their authority, and that the canal is not.

The remaining question to be considered is, whether the allegation of the bill, that this canal will seriously interfere with that work, is sustained by the evidence before us.

In this aspect of the case it is to be understood that although no answer to the bill is filed, we have admitted counter-affidavits.

The complainant supports the bill by the reports of the engineer bureau, and by the affidavits of the officers of that corps engaged on the work, and by those of other civil engineers.

The defendants have a large number of affidavits, showing that no such effect on that work will follow the opening of the canal, as is alleged in the bill.

It is urged by counsel for complainant that the reports of the engineers and their statements, made as is claimed on accurate [474] surveys, should be held conclusive. But while we concede that their action in determining the best mode of improving the entrance to the bay cannot be questioned here, we cannot give such effect to their opinions on the question of the influence of the canal on that improvement, though we concede to their opinion the value which their station and character merit.

The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory.

In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs nearly all judges, in applications for preliminary injunctions. It is that,

when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted. I am inclined, personally, to believe that the effect of opening the canal without the breakwater, or some other protection to the natural action of the flow of water through it, will tend to fill up the channel at the mouth of the river.

It is said in answer to this, that no irreparable damage can ensue from making the canal, and that more injury will result to defendants from stopping the work, than can arise from its completion. But I do not agree that the damage, if there shall be any from the canal, can be repaired without immense difficulty, and probably, not at all. While the canal might be closed with great expense, the deposits which may have accumulated at the mouth of the river, before the question is settled, may never be removed, or the removal may be too costly to justify the attempt. And, in a case of interference ^[475] with the authority of the federal government, the court cannot consider the relative amount of injury to accrue to the party thus interfering, and to the government. Such a principle would tend to encourage interference with federal authority, when it ought to be repressed.

On the other hand, if, on the final hearing, it shall be made to appear that complainants are mistaken, the injunction can be dissolved, and the work completed. And the truth in the matter can, in the mean time, be ascertained by accurate surveys, and calculations impartially made, either by officers of the government, or by competent engineers appointed by the court, or by depositions subject to cross-examination, so that when the court comes to decide, it will have the subject within its control, and will have something more than *ex parte* affidavits, some of which are, by no means, clear or precise in their statements. Or if, before the final hearing, it shall be made to appear in the manner indicated, or in any other manner satisfactory to the court, that the canal can be protected by a breakwater, so as to prevent the too rapid diversion of water from the bay, or can, in any other manner, be completed without injury to the govern-

ment works, and the complainants put their work in that condition, the injunction may be modified or dissolved.

In conclusion, I take the liberty of saying that, since Congress has taken this matter in hand by appropriating money for the improvement of these harbors, it should cause the adoption of some comprehensive plan for the improvement of both harbors, and not leave it to the conflicting interest of the two cities, or to the adverse action of the State and federal authorities.

Nor can I doubt, if the defendants here should ask of the department in charge of these improvements, a careful inquiry into the plan which they believe essential to their interests, that some mode of prosecuting such improvement would be found which would meet the approval of that department, and obviate the necessity of a final decision by this court.

[476] I am happy in the assistance of JUDGE DILLON, of this circuit, on the hearing of this application, and in his concurrence in these views.

An injunction according to the prayer will be allowed.

Ordered accordingly.

[NOTE. — At the June term, 1871, by consent of the war department, and of the attorney-general, the injunction was dissolved on the filing of a bond by the city of Duluth, in the sum of one hundred thousand dollars, conditioned that the city should complete and maintain a dyke across the bay of Superior, from Minnesota point to Rice's point, by the first day of December, 1871, and complete the canal according to plans to be approved by the chief of engineers of the war department. The bond was filed, the injunction dissolved, and further proceedings in the suit stayed.]

United States May Bring Injunction Bill to defend its rights in State limits. — Cited, *United States v. Beef Slough Mf. Co.* 8 Biss. 424; *United States v. Mississippi & Rum R. Co.* 1 McCrary, 605; S. C. 3 Fed. Rep. 552; *Wilkinson v. Tilden*, 9 Fed. Rep. 684; *State Lottery Co. v. Fitz*, 3 Woods, 257.

VANDERHOOF'S ASSIGNEE v. CITY BANK OF ST. PAUL.

ILLEGAL PREFERENCE UNDER BANKRUPT ACT—INTENT.—The requisite intent on the part of an insolvent debtor to give, and of a creditor to secure, a preference which is illegal under the bankrupt act, may be inferred from circumstances.

BANKRUPTCY—SUFFERING PROPERTY TO BE TAKEN ON LEGAL PROCESS.—Where the creditor knew the debtor to be insolvent in the legal sense, that he had committed an act of bankruptcy; that he had no property but his stock in trade; that the debtor was unable to pay or meet his debt, though urged to do so, and

when sued by such creditor for a large sum gave no notice of the suit to the other creditors, and did not defend it nor otherwise make any effort to prevent the judgment and the levy and sale of goods thereunder; and where the effect of sustaining the judgment and levy would be to allow that creditor to make his whole debt and leave the other creditors nothing. *Held*, that the levy of the execution did not under such circumstances give a valid lien on the goods as against the assignee in bankruptcy. (Per DILLON, J., NELSON, J., *contra*.)

Before DILLON, J., and NELSON, J.

THIS is a bill in equity, filed in this court by the assignee in bankruptcy of the firm of Vanderhoof Bros., against the City [477] Bank of St. Paul. The object of the suit is to determine which of the parties has the better right to the stock of goods of the bankrupts, or the proceeds thereof. The assignee claims these goods, or their value, as assets of the bankrupts. The bank, on the other hand, maintains that it secured a valid lien thereon by virtue of the judgment and execution hereinafter mentioned.

The bill attacks the judgment and execution as being obtained in violation of the bankrupt act. The pleadings and proofs show the following state of facts: About the 20th day of July, 1869, Vanderhoof Bros. purchased of Mrs. Marvin a small retail boot and shoe store in the city of St. Paul, for the sum of \$2,000, and gave their notes therefor; one for \$1,000, due in six months from the said 20th day of July; one for \$500, due in eight months, and the other for \$500, due in one year. Vanderhoof Bros. commenced business with a capital not exceeding \$600 or \$800. Before the purchase of the stock was made the City Bank of St. Paul, through Mr. Upham, the cashier, at Vanderhoof's request, agreed to discount said note for \$1,000, and afterwards did so, and it is one of the notes on which the bank subsequently recovered judgment as hereinafter stated. On the 22d day of January, 1870, the bank commenced suit against Vanderhoof Bros. in the State court, on a note dated December 24, 1869, for \$209, due January 15, 1870; on a note for \$350, dated November 2, 1869, payable to the bank, and due January 1, 1870 (indorsed January 19, 1870, \$100); a note for \$600, dated November 20, 1869, payable to the bank, and due January 19, 1870; and, also, on the above-mentioned note given to Mrs. Marvin for \$1,000, which matured

January 20, 1870. On the 26th day of February, 1870, judgment, by default, was taken on these notes in favor of the bank and against Vanderhoof Bros. for \$2,130, and on the same day an execution was issued and placed into the hands of the sheriff, and immediately afterwards levied upon the whole stock in trade of the debtors, and the same was subsequently (March 25, 1870) sold, yielding ^[478] the sum of \$2,385.71, which is now in the hands of the clerk of the United States district court.

The sale by the sheriff was first enjoined by the United States district court, but the judge thereof, on a showing that such a sale was expedient, allowed it to be made on condition that the proceeds should be deposited therein. On the 11th day of March, 1870 (after the levy and before the sale under the execution), a petition in bankruptcy was filed in the United States district court against Vanderhoof Bros., and they were (March 24), adjudicated bankrupts, and the complainant appointed the assignee. The stock in trade levied on and sold constituted all the property of the bankrupts. In addition to the above facts, D. W. Vanderhoof, as a witness for the plaintiff, testified that they transacted all their business with the City Bank, of which Mr. Upham was the cashier and active business man; that they kept their bank account there; that in December, 1869, Mr. Upham called upon them at their store for a statement of their business affairs and condition; he took it down on an envelope; it was taken from their books, and showed their debts and accounts falling due from October, 1869, to March, 1870; it showed their debts, excluding what they owed the bank, to be \$3,500, and including the debt to the bank, \$5,600, and that their assets at cost price exceeded their liabilities.

The witness also stated that in October, 1869, an inventory was taken which showed \$6,500 stock, and it had not decreased \$1,000 when statement was made; that the assets remained about the same until the levy, and were then of the value of \$5,500, but cost more than that.

He says: "We did not pay the notes to the City Bank because we did not have the money. I told the officers of the bank so—that we did not have the money. They urged payment, and I told them we were doing the best we could to collect money and to sell goods to pay them. I told them this about every time

a note became due, and when renewal notes were given, and in January, 1870. I told them we had ^[479] plenty of goods to pay all our debts if they would not crowd us." "It was through my influence that Mr. Upham advanced the \$1,000 to Mrs. Marvin, of whom we bought." "I had no conversation with Mr. Upham about the suit. After it was brought he told me that on Mr. Reed coming into the bank he disliked the account, and had forced him (Upham) to do what he had done. I told Upham I had done the best I could about making payments."

Mr. Johnson, a resident creditor, testified that after the levy he asked Vanderhoof "why he allowed the City Bank to take judgment without letting him know that suit had been commenced"; to which he replied, "because he felt under obligations to Mr. Upham."

This statement Mr. Vanderhoof, being called as a witness by the bank, denies.

Mr. Mason, a creditor, testified that he asked Upham about the judgment, and said he knew exactly how the firm stood, how much they owed, and where and when it would become due, mentioning a large Chicago debt of \$2,100, and that they could not pay it, and that Vanderhoof had promised him that if they got into trouble he would make their claim good, and that he had this understanding with him.

Mr. Upham, as a witness for the bank, testified that he had some conversation with Mr. Mason about the affairs of Vanderhoof Bros., but denied that he had ever made the statement to which Mr. Mason testified, or any statement of the kind, or that he had ever had any such understanding with Vanderhoof. He stated that suit was brought because Mr. Reed had purchased a controlling interest in the bank, was the vice-president, and insisted that the claim should be collected. He testified that the statement made to him by Vanderhoof was such a one as the bank requires of all their customers whose affairs they do not know all about. It showed, as near as he could remember, that the assets exceeded liabilities of about \$1,500, and he says he considered him solvent, and so reported to Reed, the vice-president, who nevertheless ^[480] insisted that the debt should be

collected, and that this was the reason suit was brought, and that he so stated to Mr. Vanderhoof.

Rogers & Rogers, and C. K. Davis, for the Assignee.

Newell & Brill, for the Bank.

DILLON, *Circuit Judge*.—There can be no reasonable doubt that in January, 1870, when the bank commenced suit, Vanderhoof Bros. were insolvent. They had no assets except their stock in trade. For to mention other debts, they owed the bank over \$2,100. They had no money with which to pay, and no means with which to raise money except their stock of merchandise, which at cost price did not more than equal the amount of their liabilities, and which, when sold by the sheriff, did not bring more than about one third of what they owed. Plainly, they were insolvent. They were urged to pay, and only failed to pay because they could not; and this was the reason they declared to the bank. Surely a mercantile firm, having no property but their stock in trade, who, when pressed for a debt admitted to be just, give as a reason that they are unable to pay it, and suffer judgment to be rendered against them, is insolvent within any accepted or sound definition of that term, as used in the bankrupt act, and this, although the stock in trade may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities. The notes held by the bank and on which its suit was brought were commercial paper, and one of them was, at the time suit was commenced, more than fourteen days past due, and was not paid simply because the bankrupts were unable to pay it. This was of itself an act of bankruptcy, and proof of insolvency (*Shawhan v. Wherritt*, 7 How. 644; *Smith v. Buchanan*, 4 Bank Reg. 133), and of all these facts the bank had notice.

I lay out of consideration as not sustained by the evidence the allegation of the bill that the Messrs. Vanderhoof procured [481] the judgment to be rendered; nor is it shown that there was any collusion between them and the officers of the bank with reference to the suit which the bank commenced. Undoubtedly the debtors would have preferred that suit should not have been brought; but payment being demanded which they were unable

to make, and having no defense to the notes, and feeling friendly to the bank, and under obligations to it, they suffered judgment to go against them, knowing, of course, that they could not meet it, and that their stock was liable to be, and probably would be, as it was, seized to pay it. Now under these circumstances, has the bank a right to hold the preference which it has sought to gain by its judgment and execution? If so the bankrupt act, known to have been framed to supersede the system of preferences, and to place all unsecured creditors of an insolvent upon the same footing, is signally defective. If the debtors had turned out their goods to the bank in payment of these notes, clearly the bank could not, with its knowledge of their condition, have held them against the assignee (§ 35). The act dissolved all attachments made within four months of its taking effect; and it is planted full of provisions intended to secure equality, and to prevent preferences. The bankrupts did not, before judgment, give notice to their other creditors in the same city or elsewhere that the bank had sued them. The motive of the bank in bringing suit was to secure their debt, and a knowledge of the condition of the debtors prompted the suit. The bank knew facts which, in law, showed their debtors to be insolvent and that they had committed an act of bankruptcy in not paying one of the notes in suit when urged to do it.

As the debtors did not defend the action, nor give notice to other creditors that it had been brought, nor go into bankruptcy, and were insolvent, I have no difficulty in holding that they suffered judgment to go against them, and property to be seized on execution, with an intent to defeat the act.

Of these facts the bank was cognizant, and the requisite intent on the part of debtors to give, and on the part of the [482] bank to obtain, an illegal preference may and should be inferred from the circumstances. These circumstances are the known insolvency (in the legal sense) of the debtors, the fact that they had committed an act of bankruptcy; that they had no property but their stock in trade; that being pressed to pay, they were unable to do so; that they gave no notice of the suit, and did not defend it, or go into bankruptcy, nor otherwise make any effort to prevent the judgment, levy, or sale; and that the effect of sustaining the execution proceedings would be to allow one unsecured creditor

to make his whole debt, and leave the other creditors nothing. To sustain the right of the bank to the benefit of its judgment and levy, would subvert the bankrupt act, and if such a claim were maintainable, the bankrupt act would be speedily repealed, so as to allow all creditors to strive for preferences.

A decree should, in my opinion, be entered, establishing the right of the assignee to the money produced by the sale of the goods, and ordering the defendant to pay the costs of the suit.

The testimony shows that the property brought a good price, and I do not think we should charge the defendant with the difference between what the property sold for, and its supposed market value at the time it was seized.

It is proper to add that JUDGE NELSON is of opinion that the requisite intent to defeat the bankrupt act cannot be inferred from the circumstances above mentioned, and hence that the bank secured a valid lien on the stock by the judgment and levy.

NELSON, *District Judge*.—I cannot assent to the conclusion of the circuit judge in this case. I agree that Vanderhoof Bros., being merchants, had committed an act of bankruptcy, in not resuming payment of their commercial paper within a period of fourteen days after suspension, and were thus legally insolvent at the time the suit was commenced against them by the bank. I also agree, that when urged by the bank to pay, they told the cashier "that they had no ^[483] money to pay their debts with, but their property was ample to meet all their liabilities."

The bank, with knowledge of this condition of the debtors' affairs, commenced suit upon several notes held by them against the debtors, obtained a judgment by default, and the sheriff made a levy by virtue of an execution issued before the bankruptcy proceedings were instituted. The question is now presented: Did the debtors, by remaining passive while all these proceedings were progressing, from the time of the service of the summons down to the final levy under the execution, suffer their property to be seized by legal process, with intent to give preference to the bank, or with intent to delay and defeat the bankrupt act, and did the bank have reasonable cause to believe that a fraud on the act was intended?

The intent to prefer is a necessary ingredient of the charge made in the bill of complaint, and must be proved. There is no direct evidence to establish any consent by the debtors to the commencement of a suit against them, nor of collusion between them and the bank. They said nothing in their interview with the cashier at the time when informed by him, that the directors had determined to enforce the collections of the notes by a suit which would show any intention to give a preference.

"Johnson," a creditor of the debtors, swears that one of them told him that he did not inform any of his other creditors of the proceedings instituted by the bank, because "he felt under obligations to the cashier." This testimony is met by the debtor with an emphatic denial that he ever made any such statement; so that I am satisfied that the debtor said nothing which could fix any illegal intent upon him. The complainants' counsel invokes the familiar principle that every person is presumed to intend the natural consequences of his acts, and contends that the result of all the proceedings instituted by the bank, and the conduct of the debtors enabled the former to obtain a preference, and therefore we must presume that the latter intended it.

[484] I cannot give my assent to the application of this rule to the facts as they exist in the case.

The debtors had no defense to the notes sued upon; the liability was incurred for a valuable consideration. The cashier knew all of the circumstances under which a large portion of the indebtedness had been created, and the judgment was obtained, not only without any act on the part of the debtors, but in spite of them. Any defense that the debtors might interpose would have been sham, and merely delayed the final judgment. The law of this State would not justify any such conduct on the part of the debtors, and no honest debtor would seek to delay a recovery of a just debt by interposing a sham defense. Upon this state of the case, how can the judgment obtained by due course of law, establish an intent to prefer the judgment creditor?

It is said by counsel that the debtors should have defeated the action of the bank by voluntarily filing their petition in bankruptcy.

I can find nothing in the law compelling an insolvent debtor to thus put himself into bankruptcy. Various reasons, satisfactory to himself and in accordance with good faith, may influence him and prevent him from doing this. He may not wish to acknowledge, by so doing, that he is hopelessly ruined in his business; or he may think that he will still be enabled, with his property on hand, to arrange with his creditors by obtaining additional time within which to pay his indebtedness. Entertaining these views, I cannot believe that in this case, when the debtors have sworn that they did not intend to give a preference, such intent can be fairly inferred because they did not seek the bankrupt court.

If the judgment obtained under these circumstances does not substantiate the charge of an intent to prefer, did the further proceedings taken by the sheriff, to wit, a levy by virtue of an execution, establish the charge that the debtors suffered their property to be seized by legal process with intent to give a preference?

[485] The laws of this State provide that a judgment is a lien on real estate as soon as docketed, and point out the steps necessary to be taken to make it a lien on personal property. The law directed the sheriff in the discharge of his duties, and the lien became perfect upon the property in controversy here, without any participation of the debtors in the matter. The lien, having been thus obtained before bankruptcy proceedings were instituted, in my opinion, is protected by the act. If it is not to be recognized as valid, but it is to be regarded as obtained in violation of the act, and a fraud upon it, Congress must say so, or the supreme court so decide.

The circuit judge being of the opinion that the assignee should recover, a certificate of division was ordered, on questions stated.

[NOTE. — As to proof of fraudulent preference, see *Giddings v. Dodd*, ante, 115; *Linkman v. Wilcox*, ante, 161; *Rison v. Knapp*, ante, 171; *Martin v. Toof*, ante, 204; *Wright v. Filley*, ante, 171.]

The Supreme Court Answered the first and second questions in the negative, and the third in the affirmative. — *Wilson v. City Bank*, 17 Wall. 473.

UNITED STATES v. WILLIAMS.

CRIMINAL LAW—PLEAS IN ABATEMENT DEFINED.—Pleas in abatement to an indictment are dilatory pleas; and not being favored, the law requires that they shall be pleaded with strict exactness. (*Arguendo*).

ID.—INDICTMENT.—A plea in abatement construed to mean that the indictment should not be for the prosecution because an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill.

ID.—Whether such a plea is good, *quere?* Authorities cited.

JURORS—DISQUALIFICATION OF.—Distinction suggested between disqualification of a juror, absolutely pronounced by statute, such as alienage, non-residence, etc., and which would constitute cause of principal challenge, and a disqualification arising from bias, interest, and the like, which would constitute simply cause of challenge to the favor. (*Arguendo*).

INDICTMENT—PROSECUTOR MEMBER OF GRAND JURY—EFFECT.—Where a prosecutor, without any agency of his own, is drawn by lot from a large number of names to serve as a grand juror, and is sworn on the panel without objection, and prefers a charge, testifies, and takes part in the deliberations concerning it, and a bill is found, *held* (construing [486] the acts of Congress relating to grand juries, and the statutes of the State respecting the *qualification* of grand jurors), that the mere fact that the prosecutor was a member of the jury, and participated in its proceedings would not be good ground for a plea in abatement to the indictment.

QUALIFICATIONS OF GRAND JURORS—ACT OF JULY 20, 1840, CONSTRUED.—The Act of Congress, of July 20, 1840 (5 U. S. Stats. 394), as to the "*qualification*" of grand jurors in the courts of the United States, discussed, and the opinion, *arguendo*, expressed that the word "*qualification*," as there used, referred to general qualifications, such as age, citizenship, etc., and not to bias, interest, and the like, which do not disqualify generally, but only at the instance of the party concerned, and where the effect of a challenge, if sustained, is not to exclude the juror from the panel, but only from acting in the case of the defendant who interposed the challenge.

ID.—PRACTICE.—Reasons drawn from the history of the grand jury, for requiring more jurors to be summoned than are necessary to concur in finding a bill, stated.

PRACTICE ON OVERRULING PLEA IN ABATEMENT.—Upon the verdict of a jury, against a plea in abatement to an indictment, judgment was entered overruling the plea, and allowing the defendant to plead not guilty.

Before DILLON, J., and NELSON, J.

THE indictment charges the defendant, late deputy collector of internal revenue, with the embezzlement of certain public money. The bill was found in the district court, without any preliminary examination, before a magistrate; and after plea in abatement, and replication filed, the case was transferred to this court. It is stated in the indictment that it is found by a grand jury of seventeen jurors. On the bill appears this indorsement: "Names of Witnesses: J. N. Hall, D. L. How." No other witnesses are named in the indorsement on the bill.

The plea in abatement, after the formal part, is in these words: "The United States ought not further to prosecute the said indictment, because the defendant says that three of the grand jurors of the panel which found the indictment and acted thereon, namely, D. L. How, J. N. Hall, and J. W. ^[487] Senserbox were incompetent to act or sit thereon, for that the said D. L. How was then and there surety for this defendant as such deputy collector of internal revenue, and the said J. N. Hall was the collector of internal revenue under whom this defendant was such deputy; and the said D. L. How was then and is the prosecutor and prosecuting witness along with the said J. N. Hall, upon the accusation set forth in the indictment, and all said three persons became members of said grand jury at the instance and denomination of said D. L. How." Here follows the formal and proper conclusions to such a plea.

These allegations are traversed by the replication, which asks that the issues thereby made be inquired of by the country.

At the June term, 1870, of the circuit court, a jury was called to try the issues made by the replication to the plea in abatement, and both parties produced testimony. The court submitted to the jury the following special questions, which the jury answered as below stated:—

1. *Special Issues to the Jury:* Did the said How, Hall, and Senserbox, named in the plea, serve on the grand jury which found the bill of indictment against the defendant, and were they present at, and did they participate in, the proceedings on the charge against the defendant; and were they present when the vote was taken on the finding of the bill? The jury answer, "Yes."

2. Was the said Hall collector of internal revenue, and said Williams his deputy, and said How the surety of the said Williams? The jury answer, "Yes."

3. Were the said Hall and How, or either of them, the prosecutor in the charge against the said Williams before the said grand jury at the term when the bill was found? The jury answer, "No."

4. Did said Hall or How testify before the said grand jury as witnesses on the charge against the said Williams? The jury answer, "Yes."

[488] 5. Did the said Hall or How become members of the said grand jury which found the bill at the instances, and on the nomination, of the said How? The jury answer, "No."

No evidence was given on the trial as to the said Senserbox named in the plea, except that he was a member of the grand jury, at the term at which the bill was found.

After the special verdict above given was found, the defendant moved for a new trial upon the third special interrogatory on two grounds, to wit: 1. The finding of the jury that neither Hall nor How was the prosecutor of the charge against the defendant before the grand jury was against the evidence delivered on the trial. 2. Upon the ground of newly discovered evidence, viz.: A letter from How to the defendant, dated sometime before the bill was found, stating that if the latter did not "make good the amount of money he had embezzled as deputy collector, and settle with Mr. Hall, I shall cause criminal proceeding to be commenced against you as an embezzler, etc. An affidavit of the defendant is filed showing that this letter had escaped his recollection, and was accidentally found after the trial, when searching for the contract between him and Hall, his principal. An affidavit of the defendant's attorney is also filed stating his ignorance until after the trial of the existence of this letter. It is this motion for a new trial which is now before the court for determination. In 1866, the court "ordered that in actions at law, the practice and pleadings now existing in the district courts of the State of Minnesota be adopted in the circuit court of the United States for this district," but the order did not extend to criminal cases or proceedings.

The statutes of Minnesota, after prescribing the qualifications and number of grand jurors in the State courts, and how these shall be obtained, provides that "a person held to answer a charge for a public offense, may challenge the panel of the grand jury, or any individual juror, before they retire, after being sworn and charged by the court." It limits challenges [489] to the panel to three causes, all referring to irregularities in the drawing of the names from the grand jury box. The statute then enacts that "a challenge to an individual juror may be interposed for one or more of the following causes only: 1. That he is a minor. 2. An alien. 3. Insane. 4. *That he is a*

prosecutor upon a charge against the defendant. 5. That he is a witness on the part of the prosecution, and has been served with process, or bound by a recognizance as such. 6. A state of mind which satisfies the court that the juror cannot act impartially, and without prejudice to the substantial rights of the party challenging." (Rev. Stats. of Minnesota, 1866, pp. 637, 638.)

A subsequent section in the same chapter provides that a grand juror is not to be questioned for his action as such juror, "except for perjury, of which he may be guilty *in making an accusation, or giving testimony to his fellow jurors.*" (Rev. Stats. of Minnesota, 1866, p. 640.)

By the judiciary act it is provided that jurors to serve in the courts of the United States "shall have the same *qualifications* as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State." (1 U. S. Stats. 88, § 29.) By the Act of Congress, July 20, 1840, it is provided that "jurors to serve in the courts of the United States, in each State respectively, shall have the like *qualifications*, and be entitled to the like *exemptions*, as jurors of the highest court of law of such State now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, etc. (5 U. S. Stats. 394, § 1.) By the Act of Congress of March 3, 1865, it is provided that grand jurors in the national courts, "shall consist of not less than sixteen and not exceeding twenty-three persons"; "*and whenever a challenge to an individual grand juror is allowed, and there are not other jurors in attendance to complete the panel, the court shall make an order to the marshal to summon a sufficient number of persons for that purpose. No indictment shall be found without* ^[490] *the concurrence of at least twelve grand jurors.*" (13 U. S. Stats. 500, § 1.)

What constitutes a sufficient cause for a challenge to an individual grand juror is not prescribed by this act, but by another act it is provided that certain disloyal practices shall be grounds of challenge of grand jurors and petit jurors. (12 U. S. Stats. 430.)

The motion for a new trial was argued by—

Chatfield, and Warner, for the Motion.

C. K. Davis, District Attorney, *contra*.

DILLON, *Circuit Judge*.—It is essential to a proper disposition of the motion for a new trial to determine the nature of the plea in abatement. The language of the plea appears above. After carefully considering it, our opinion is that the gravamen of the plea is that the parties named (sustaining the relation to the defendant described herein) “became members of the grand jury which found the bill, at the instance and denomination of the said D. L. How.” All that precedes this averment is introductory, and intended to show why it was improper, and prejudicial to the rights of the defendant that these parties should have served on the grand jury which indicted him.

It is not believed that it was the purpose of the pleader improperly to set forth in one plea three distinct matters in abatement, to wit: 1. That How was the prosecutor. 2. That he was the prosecuting witness along with Hall. 3. That the three parties named became grand jurors at the instance of How; but rather that it was the purpose to set forth the one ground above stated.

Pleas of this character are dilatory, and not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness. (*O’Connell v. Queen*, 11 Clark & F. 155, 9 Jur. 25; *Commonw. v. Thompson*, 4 Leigh, 667; *State v. Newer*, 7 Blackf. 307; *Wilburn v. [491] State*, 21 Ark. 198; *Hardin v. State*, 22 Ind. 347; *Lewis v. State*, 1 Head, 329.)

The plea in abatement seems to be drawn as if founded upon the celebrated and ancient statute of 11 Henry, 4, cap. 9, passed in 1410, and which may be found set out in Bacon’s *Abridgement*, *Juries*, A. 233. This statute, after reciting the abuses which led to its enactment, declares: “Henceforth no indictment shall be made by any such [improper] persons, but only by inquests of the king’s lawful liege people . . . returned by the sheriff . . . *without any denomination to the sheriff, by any person of the names which by him should be impaneled*, except it be by officers sworn and known to make the same; . . . and if any indictments be hereafter made in any point to the contrary, that the same indictment be also void, revoked, and forever holden for none.”

The plea then, in this case, is to be taken as setting forth that the indictment should not be prosecuted, because the persons mentioned in the plea were, by an interested party, viz., Mr. D. L. How, caused to be placed on the grand jury which found the bill.

The question is not now directly before us whether such a plea is good in the federal courts. Undoubtedly such an objection is good if taken by a person under prosecution, or who has been held to answer, by way of challenge, before the jury is sworn or the indictment found.

Whether in the case of a person not previously bound over it may be taken after a bill found by plea in abatement or motion to quash, the authorities are not entirely agreed. As tending to show that it must be taken before indictment is found, see Bacon's *Abr. Juries*, A. 233; *The People v. Jewett*, 3 Wend. 314; S. C. 6 Wend. 386; *Commonw. v. Smith*, 9 Mass. 107; compare *Commonw. v. Parker*, 2 Pick. 563; *State v. Rickey*, 5 Halst. 83; *Thayer v. People*, 2 Doug. (Mich.) 417; *Baldwin's Case*, 2 Tyler, 473; *Rex v. Sheppard*, 1 Leach Cr. Cas. 101.

[492] But in many, indeed, from an examination of the authorities, I may say that in most of American States it is held that where a party has not been recognized to answer, he may plead in abatement, if done seasonably, the want of statutory qualifications, such as want of citizenship, etc., in grand jurors who found the bill. (*Hardin v. State*, 22 Ind. 347; *Wilburn v. State*, 21 Ark. 198; *State v. Cole*, 17 Wis. 664; *Kitrol v. State*, 9 Fla. 9; *Stanley v. State*, 16 Tex. 557, and other cases cited; Whart. Cr. Law (2d ed.), pp. 172, 173; and in *The State v. Ostrander*, 18 Iowa, 435, note.)

In the federal courts the sufficiency of pleas in abatement, in the absence of legislation by Congress touching the question or authorized rules of court, must be tested by the principles of the common law. And by the common law it is undoubtedly true as stated by Mr. Wharton, that "if a disqualified person is returned as a grand juror it is good cause of challenge." (Whart. Cr. Law (2d ed.), 170; 1 Chitty Cr. Law, 309.) Mr. Chitty at the place just cited states the doctrine thus: "If a disqualified juror be returned he may be challenged by the prisoner before bill presented; if the disqualification is discovered

afterwards, the defendant may plead it in avoidance and answer over to the felony." (And see, also, Hawkins, P. C. B., 2 C. 25, § 16.)

But the disqualification thus referred to is such as is pronounced by statute, and which absolutely disqualifies, such as alienage, non-residence, want of free hold qualification, where that is required, etc., and which would constitute cause of principal challenge as distinguished from challenge to the favor arising from bias, interest, and the like. See on this point, *State v. Rickey*, and *People v. Jewett*, before cited.

But it is not necessary further to pursue the discussion of the subject in this place, for if the gravamen of the plea in the case at bar be such as we have above indicated, the fifth special finding of the jury is the material one, and by that the jury have negatived the truth of the plea by saying that neither Hall nor How became members of the grand jury, ^[493] which found the bill, at the instance or on the nomination of How. The finding of the jury on this point is not questioned by counsel, no motion for a new trial is made with respect to it, and it is to be taken as conclusively correct. Thus taken, it is to be presumed that both Hall and How were properly selected to serve on the grand jury, and that they did not become members of it at the instance or by the procurement of How. In this view of the case, the third finding, concerning which the motion for a new trial is made, is *under the plea*, immaterial; and if so, a new trial should not be granted thereon, even though the court should be, as it is, of opinion that the verdict of the jury on this issue was against the evidence.

The foregoing view is based upon the construction above given to the plea in abatement. But suppose, as the jury might have found from the evidence, or might yet find if a new trial should be granted as asked in the motion under consideration, that How was *the prosecutor or prosecuting witness* against the defendant, and suppose the plea be taken as intended to set this forth as the ground of abatement of the indictment, would the plea then be sufficient in law to work this result? This question must, in my opinion, for the reasons which I proceed to state, be also answered in the negative. By the act of Congress referred to in the statement, jurors in the federal courts are required to

“have the like *qualifications* and are entitled to like exemptions as jurors” in the highest courts of the State; by the statute of Minnesota it is provided that “all persons who are qualified electors of this State are liable to be drawn as grand jurors, except as hereinafter provided.” (Rev. Stats. 1866, p. 636, § 3.) The exemptions consist of certain public officers, followers of certain professions and avocations, persons over a specified age, infirm persons and such as have been convicted of an infamous crime. The grand jury is directed to be selected by lot from a jury box containing names procured in a designated manner. Then follow the provisions referred ^[494] to in the statement of the case authorizing *any person held to answer* for a public offense to challenge for the causes specified in the panel of the grand jury any individual juror.

Among the grounds of challenge to an individual grand juror is, “that he is a *prosecutor* upon a charge against the defendant”; and also, “that he is a *witness* on the part of the prosecution, and has been served with process, or bound by a recognizance as such.”

The statute provides that, “if a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charges against the defendant by whom the challenge was interposed; if they should, notwithstanding, do so, and find an indictment against him, the court shall direct it to be set aside.” (Rev. Stats. 1866, p. 638, § 18.) The next section enacts that, “if a challenge to an individual juror is allowed he cannot be present at, or take part in, the consideration of the charge against the defendant who interposed the challenge, or the deliberation of the grand jury thereon. The grand jury shall inform the court of a violation of this provision, and it is punishable by the court as a contempt.” (Rev. Stats. 1866, §§ 19, 20.)

The only other section of the Minnesota statute bearing upon the present inquiry is the one which provides that a grand juror shall not be questioned for his acts as such, “except for a perjury, of which he *may be guilty in making an accusation, or giving testimony to his fellow-jurors.*” (Rev. Stats. 1866, p. 640, § 42.)

Now we have seen, by the Act of Congress of July 20, 1840, that whoever is *qualified* to serve as a grand juror in the State

courts is qualified to serve as such in the courts of the United States. The argument on behalf of the defendant, based upon the act of Congress just cited and the above-mentioned provisions of the Minnesota statute, is, that by the State statute a prosecutor or prosecuting witness is not *qualified* to serve as a grand juror in the State courts, and hence not *qualified* to serve in the courts of the United States.

[495] Now what does the word "*qualification*" mean in the Act of July 20, 1840, by which jurors in the federal courts are required to have the like *qualification*, and are entitled to like exemptions, as jurors, in the State courts? In my opinion, the word refers to the general qualifications as to age, citizenship, etc., not to special reasons which at the instance of a party accused and bound over may at his election amount to a disqualification to sit in his case, but which, if they exist, do not exclude the juror from the panel, but only preclude him from acting in the particular case. He is, nevertheless, if the challenge be sustained, a member of the grand jury (see *The State v. Ostrander*, 18 Iowa, 435, 441), the only effect being that he shall not "take part in consideration of the charge against the defendant, who interposed the challenge."

I am aware that a different view on this point seems to have been taken by a most distinguished judge (Nelson, J., in *United States v. Reed*, 2 Blatchf. 435), from whose opinion I differ with the most unaffected distrust of the correctness of my own judgment.

But suppose I am mistaken on this point, yet I think it clear that when all the provisions of the Minnesota statute are considered, it is manifest that where there has been no previous holding of the party to answer, the statute as to challenging jurors does not apply, and that the statute itself contemplates that a grand juror "may make an accusation, or give testimony to his fellow-jurors."

The jury in the case under consideration have found that How (who in the view we are now taking of the question may be admitted to be the prosecutor or prosecuting witness) did not procure himself to be placed upon the panel. He is to be regarded as having been legally selected and summoned to serve on the grand jury. Being thus properly on the grand jury,

without any agency or intervention of his own, suppose he knows of a public offense having been committed within the jurisdiction of the court, and of a nature ^[496] cognizable by the jury of which he is a member; can he not disclose it to his fellow-jurors? Is it not, indeed, his duty to do so? If he knows any material fact may he not be sworn as a witness before the jury? Indeed, is it not his duty, in such a case, to be sworn, especially if required to do so by the jury? These questions must all, I think, be answered affirmatively. And in my opinion it does not alter the matter, or vitiate the indictment, if the juror should happen to be the party injured, and hence the prosecutor or prosecuting witness, always assuming that he was selected and put upon the jury without any improper act or influence of his own.

That such a grand juror is not *disqualified* within the contemplation of the statute, is a fair if not necessary inference from the provision before cited, exempting a grand juror from liability for his acts as such, "except for a perjury, of which he may be guilty in *making an accusation, or giving testimony to his fellow-jurors.*" The language clearly pre-supposes that a juror may make an accusation, and may testify as a witness concerning it.

In England, it said that a grand jury may find a bill on their own knowledge (*Reg. v. Russell*, 1 Car. & M. 247); how much better to find it upon the sworn evidence of one or more of their own number.

Other considerations fortify the above views. At common law the grand jury may consist of any number between twelve and twenty-three; but to find a bill there must at least twelve of the jury agree. (4 Blackst. Com. 302, 306; and cases and authorities cited, 18 Iowa, 442.)

By the Act of Congress of March 2, 1865 (13 U. S. Stats. 500), it is provided that grand juries in the courts of the United States "shall consist of not less than sixteen and not exceeding twenty-three persons," . . . "and that no indictment shall be found without the concurrence of at least twelve grand jurors." The earlier authorities show that the accusing body, now called the grand jury, originally consisted of twelve persons, and all were required to concur. ^[497] The number was subsequently enlarged to twenty-three, which was the maximum. (See authorities cited,

18 Iowa, 442.) Undoubtedly one reason why both at common law and by act of Congress more jurors are required to be summoned, and by the act of Congress to be impaneled than are necessary to find a bill, is to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel.

In any view which I have been able to take of the case the motion for a new trial must be denied; and on the verdict of the jury a judgment will be entered overruling the plea in abatement, and allowing the defendant to enter a plea of not guilty.

NELSON, *District Judge*, concurs in the view taken of the construction of the plea in abatement; but is of opinion that if a prosecutor, who is a member of the grand jury, should take part in the finding of the indictment, it would vitiate it.

Motion denied.

Note. Pleas in Abatement to Indictment must contain essential averments with strict exactness.—Followed, *United States v. Hammond*, 2 Woods, 198, 201; *State v. Hamlin*, 47 Conn. 106.

HERMAN MARKSON AND HUGH M. SPAULDING, ASSIGNEES, v. DANIEL HEANEY.

BANKRUPTCY—JURISDICTION OF STATE AND FEDERAL COURTS.—A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States district court of Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced suit to foreclose in one of the State courts of Indiana without permission of the bankrupt court, making the assignees defendants. The mortgagee was a resident and a citizen of Minnesota. The assignees in bankruptcy filed a bill in the circuit court of the United States for the district of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the bankrupt law, and asking a decree to have it declared void, and for an injunction to restrain the defendant further prosecuting his foreclosure suit in [498] Indiana. *Held*, 1. That the district court in which the bankruptcy proceedings are pending, or the circuit court for *that district*, can, in cases where the suit in the State court is commenced *after* the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same. *Held*, 2. That in this case the circuit court for the Minnesota district had no bankruptcy jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused.

Id.—PRACTICE.—Whether in such a case the assignee may not, by an application to the bankrupt court, be authorized to sell the mortgaged property free of encumbrance, substitute the proceeds in the place of the property, giving the

mortgagee notice wherever residing, and whether process in bankruptcy can, when necessary to exercise powers conferred by the bankrupt act, be rightfully served on parties interested outside of the district in which the bankruptcy proceedings are pending, are questions discussed, but left open.

Id. — Powers of bankrupt courts and of the circuit courts and the purpose of Congress in establishing bankruptcy tribunals, considered.

Id. — Petition for a review of a subsequent order of sale made by the district court, and steps taken thereunder, see note at foot of the opinion.

Before DILLON, C. J., at Chambers.

THIS is a bill in equity filed in the circuit court of the United States for the district of Minnesota, praying for an injunction and relief. The plaintiffs are assignees in bankruptcy of one Antipas Thomas, and bring this bill in that capacity, alleging themselves to be citizens of the State of Kansas. The defendant is alleged to be a citizen of Minnesota, which is admitted in the answer to be true, and he was served in that State with process issued upon the bill.

From the bill, answer, and exhibits, the following facts appear: On the 16th day of December, 1869, Antipas Thomas was, by the district court of the United States for the district of Kansas (of which he was a resident), adjudged a bankrupt, upon the petition of creditors filed on the 3d day of that month. In May, 1870, the plaintiffs were duly appointed assignees in bankruptcy of Thomas, and a deed of assignment has been made to them of all the property and estate of the bankrupt, save such as the law exempts.

[499] The bill alleges, and the answer admits that, *prior* to the commencement of the bankruptcy proceedings against Thomas, to wit, on the 25th day of October, 1869, he, the said Thomas, executed a promissory note to the defendant, Daniel Heaney, for the sum of twenty-six thousand five hundred dollars, and at the same time executed to secure it a mortgage upon lands belonging to him and situate in Kosciusko County, Indiana. The bill charges that this mortgage is fraudulent. 1. Because there was only a real debt due from Thomas to Heaney of four thousand dollars, and because it was made to hinder, delay, and defraud creditors. 2. Because it was made in violation of the bankrupt act, since Thomas was insolvent, and Heaney, when he received the mortgage, knew, or had reasonable cause to believe, that Thomas was insolvent, and that the mortgage was

made in fraud of the provisions of the bankrupt act. It may here be observed that the answer of the defendant in effect denies these charges of fraud. The bill avers, and the answer admits, that *after* the proceedings in bankruptcy were commenced, and after the date of the plaintiffs' appointment as assignees, to wit: On the 14th day of September, 1870, the defendant, Heaney, commenced in the circuit court of the State of Indiana for the county of Kosciusko (where the mortgaged lands are situate) a bill to foreclose the above-mentioned mortgage, making as defendants thereto, not only the said Thomas, *but the present plaintiffs* (the assignees in bankruptcy of his estate). The bill alleges that on the 19th day of November, 1870, the plaintiffs filed a bill in the circuit court of the United States for the district of Indiana, against the defendant, setting up in substance, the same facts as in the present bill, and praying the same relief, and an injunction against further steps by the defendant in his foreclosure proceeding in the State court, but the defendant not being a citizen of, or found in, the district of Indiana could not be served, and the bill was consequently dismissed.

It appears from the pleadings that in the foreclosure suit in Indiana, the present plaintiffs (being made defendants ^[500] thereto) were notified of its pendency *by publication*, pursuant to the law and the practice of the State courts; and that at the next term, to wit, on the 29th day of November, 1870, the assignees appeared in the said State court and setting up the said adjudication of the mortgagor as a bankrupt, and their appointment as his assignees by the United States district court for Kansas, pleaded to the jurisdiction of the State court, which plea was decided to be insufficient, and exceptions taken. Afterwards, on the 1st day of December, 1870, the plaintiffs filed an answer setting up against the mortgage, in effect, the same matters pleaded in the present bill, to wit, that it is both fraudulent in fact, and under the bankrupt law. Afterwards, on the application of the present plaintiffs, a change of venue was ordered to the circuit court of the State for the county of Steuben, in which court the cause is now pending, and stands for trial at an early day.

The bill prays that on the final hearing the mortgage may be declared void, and meanwhile that a writ of injunction issue to

restrain the defendant from proceeding further in prosecution of his foreclosure suit in the State court in Indiana, or from taking or obtaining judgment against the said Thomas on the note, and for general relief.

The bill was presented to the circuit judge at his chambers, January 7, 1871, for the allowance of the temporary injunction therein prayed for, and he directed notice to be given to the defendant, which has been done. The defendant appeared and filed an answer to the bill denying the fraud alleged, and produced, on the hearing of the motion for an injunction, certain affidavits showing the value of the mortgaged estate to be about forty-one thousand dollars, or about ten thousand dollars or twelve thousand dollars more than the sum named in the mortgage, and tending to show that he did not have cause to believe when he received the mortgage that Thomas was insolvent. The plaintiffs produced affidavits and documentary evidence showing that Thomas and one Edwards were bankers in Kansas; that the firm suspended payment in a few days after the mortgage in question was ^[501]executed; that they were insolvent, and the property mortgaged constitutes a large portion of the available assets of the bankrupt, and also tending to show notice of the insolvency, etc., on the part of the defendant when he received the mortgage.

Z. E. Britton, and Morris Lamprey, for the Motion.

Jas. T. Lane, and Davidson & True, Contra.

DILLON, *Circuit Judge*. — The adjudication of bankruptcy was made by the United States district court for the district of Kansas, where the bankrupt resided. The property mortgaged to the defendant is situate in Indiana; and the defendant himself is a citizen of and resides in Minnesota. He has never proved, or offered to prove, his debt in bankruptcy; but after the proceedings in bankruptcy were instituted, and the assignees appointed, and while those proceedings were pending in the bankruptcy court in Kansas, the defendant commenced and is prosecuting in one of the State courts of Indiana a bill to foreclose his mortgage, making the assignees defendants thereto, and constructively serving them by notice of publication, pursuant

to the laws of the State, and practice of the State tribunals. The present bill is filed by the assignees, not in the circuit court of the United States for the district of Kansas, but in the circuit court for the district of Minnesota, and the suit was thus commenced because service of process could not be had upon the defendant in the former district. A similar suit was brought by the assignees in the United States circuit court for Indiana; but because the defendant could not be there served it was withdrawn.

The bill charges that the mortgage made by the bankrupt to the defendant, a few days before the former suspended payment, and which the latter is seeking to have foreclosed in the State court in Indiana, is both fraudulent in fact and under the bankrupt act; and it seeks a decree to have it so adjudged, and meanwhile asks for a writ of injunction to ^[502]restrain the defendant from the further prosecution of the foreclosure suit. The case is now before me on the application for the injunction. In support of the application, it is argued by the counsel for the assignees that the bankruptcy court in Kansas, in which the proceedings in bankruptcy were commenced and are pending, has exclusive jurisdiction over the estate of the bankrupt wherever situate, and over the claims of creditors, secured and unsecured, wherever residing; that the assignees are officers of the bankruptcy court; that since the adjudication in bankruptcy was had before the defendant commenced his suit to foreclose, it follows that the bankrupt court first acquired jurisdiction, and if so, it could not be interfered with by proceedings in any other courts, and if such proceedings be commenced, the federal courts not only have the power, but it is their duty to enjoin litigants in the State courts, whenever necessary, to give full effect to the bankrupt act.

On the other hand, the defendant's counsel argue that a mortgage creditor is not bound to, nor can he be compelled to prove up his claim in the bankrupt court; that the only effect of not proving it up is that he waives or loses all right to share in dividends in respect to any balance of his debt which the mortgaged estate may prove insufficient to pay; that such a creditor, notwithstanding the mortgagor shall have been adjudged a bankrupt, may rightfully file his bill in any State court, having

jurisdiction, to foreclose his mortgage; that the defendant did so file his bill in this instance, and that the assignees, having appeared thereto and answered, setting up as a defense the same matters which are made the basis of the present bill, the result is that the State court in Indiana first acquired jurisdiction of the matter in controversy, to wit, the validity of the mortgage; and if so, then on acknowledged principles of law, no other court can arrest or interfere with the exercise of such jurisdiction.

Section 1 of the bankrupt act constitutes the district courts of the United States courts of bankruptcy, and confers [503] and defines their jurisdiction: "That the several district courts of the United States be, and they are hereby, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts, in all matters and proceedings in bankruptcy; and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. . . . And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; *to the collection of the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to be acts, matters, and things done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy,*" etc.

The language of this section is taken in part from the sixth section of the Bankrupt Act of 1841, and the part above, placed in italics, from Judge Story's opinion in *Ex parte Christy*, 3 How. 203, expounding the policy and purpose of that act. I shall again refer to this opinion, after calling attention to the provisions contained in the second section of the bankrupt act of 1867, respecting the jurisdiction and powers of the *circuit* courts of the United States.

This section, after giving "the several *circuit* courts of the United States *within and for the districts where the proceedings*

in bankruptcy shall be pending, a general superintendence and jurisdiction," revisory of all cases and questions in the district court arising under the act, adds that, "Said circuit courts shall also have *concurrent jurisdiction with the district courts of the same district* of all suits at law or in equity which may or shall be brought *by the assignee in bankruptcy* ^[504] *against any person claiming an adverse interest, or by such person against the assignee, touching any property or right of property of said bankrupt transferable to, or vested in, such assignee."*

It is not my purpose to recite in detail the various provisions of the bankrupt act; but a review of them would clearly show, as I think, that Congress in passing the act, in pursuance of its constitutional power, not only intended to make it uniform, but *operative* throughout the United States. It does not stop at State lines, and the bankruptcy tribunal it establishes not only acts independently of State tribunals, but it would be destructive of the system itself to permit suitors by resorting to State tribunals to withdraw, against the will of the bankruptcy court, property or cases which belong to its jurisdiction.

Property, wherever situate, which is not exempted from the operation of the act, passes to the assignee, who is an officer of the bankrupt court, and thus is in the custody or under the control of that court. This is equally true of property under mortgage as of that which is unencumbered. (See §§ 14, 20, 22, 25.) Debts, whenever payable, and creditors wherever residing in the United States, are within the operation of the act. The bankrupt court is invested with this jurisdiction over the bankrupt and his estate, and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors according to their respective rights. The priorities of *bona fide* mortgagees and lien-holders are protected by the bankrupt act, and will be respected by the bankrupt court in the final settlement and distribution of the estate. "*By operation of law, the deed to the assignee conveys to him all the estate, real and personal of the bankrupt*" (§ 14), and "the assignee has authority, under the order and direction of the court, to redeem or discharge any mortgage, . . . real or personal, whenever payable, or to sell the property subject to such mortgage." (§ 14, and see §§ 15, 20, 22, 25.)

[505] Thus it is plain beyond controversy, that the property of the bankrupt, though situate, as in this case, in another State, and though mortgaged by the bankrupt prior to the institution of proceedings in bankruptcy against him, is within the jurisdiction and under the control of the bankrupt court in Kansas. I think that to be an erroneous construction of the bankrupt act, which holds under the somewhat inapt phraseology of section 20, that mortgage creditors have absolutely the election to stand outside of the operation of the bankrupt act. Their debts are required to be scheduled, and the mortgaged estate to be inventoried by the bankrupt (§ 11); the title thereto passes to the assignee, subject to the mortgage, and the assignee may sell, sue for, and manage the property (§ 14); the debt of the mortgagee is provable, and such proof does not waive the lien (§§ 19, 20, 22); the assignee may redeem the mortgage debt, or sell the equity of redemption vested in him (§§ 19, 20, 22), and it follows from these various provisions that the assignee has a right to call the mortgage creditor into bankruptcy court, or into the proper circuit court, and test the validity of his mortgage or the amount due thereon. (*Ex parte Christy*, 3 How. 321, and cases cited, *infra*.)

It is not necessary in this case to say that the mortgage creditor is bound at all events to go into the bankrupt court and prove his debt, or ask to foreclose, or to have the property sold and his debt paid from the proceeds. (See *Davis v. Carpenter*, 2 Bank. Reg. 125; *Dwight v. Ames*, 2 Bank. Reg. 147.)

It is clear that the assignee has at all events the right to bring the mortgage creditor into the court of bankruptcy (unless he prefers to file a bill in equity in the proper circuit court), and contest the amount of his debt and the validity of his mortgage, and to have the court make such equitable orders as to the disposition of the property as seem best.

The powers to "ascertain and liquidate liens" on the property of the bankrupt, "to adjust the various priorities [506] and conflicting interests of all parties, and to marshal and dispose of the different funds and assets," and the other express powers of disposition and sale of property, confer upon the bankrupt court the right of control over mortgaged estates and the mortgagees, and by implication give the right to prevent its control from

being taken away by the resort on the part of the creditor to other tribunals against the will of the bankrupt court.

This view of the law is sustained by the opinion of Mr. Justice Nelson, in the case of the *Kerosene Oil Company*. In that case the oil company were adjudged bankrupts on the 16th day of June, 1868. The New York Guaranty and Indemnity Company held a mortgage on the realty of the oil company, and on the 10th day of October, 1868 (after the adjudication in bankruptcy), commenced a foreclosure suit in the *State* court. A bill was filed by the assignee in the bankruptcy court alleging the invalidity of the mortgage, and praying that it be declared void, the property sold, and the proceeds brought into court and disposed of, according to the rights of the several parties, and for an injunction enjoining the Guaranty and Indemnity Company from taking any further proceedings in the foreclosure suit. The injunction was granted by the district court (2 Bank. Reg. 164), and on review this action was sustained by Mr. Justice Nelson (3 Bank. Reg. 31), who directly affirmed the jurisdiction of the district court to entertain such a bill and grant such relief, and asserted a concurrent jurisdiction in the circuit court of the same district.

The right in a proper case to enjoin proceedings in State courts which contravene the bankrupt act, is declared by the circuit court of the United States, in the cases of *Irving v. Hughes*, heard before Grier, J., and Cadwallader, J. The court says: "The State court cannot be enjoined, but the litigants in it may be restrained from doing what would frustrate, or directly impede, the jurisdiction expressly conferred by the bankrupt act." (7 Am. Law Reg. N. S. 209.) ^[507] And it is the opinion of Chase, C. J., that after the bankruptcy, liens must be enforced under the superintendence of the national tribunals. (*In re Wynne*, 8 Am. Law Reg. N. S. 627.) A similar view of the Bankrupt Act of 1841 was taken by Mr. Justice Story, in *Ex parte Christy*, 3 How. 321. "Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges and expenses, could be safely relied on where the jurisdiction was confided to a single court in the collection of assets, in the ascertainment and liquidation of liens, and other

specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing sales at such time and in such manner as should best subserve the interests of all concerned; in preventing, by injunction, or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the State tribunals, and finally in making a due distribution of the assets, and bringing to a close within a reasonable time, the whole proceedings in bankruptcy."

This language was quoted and approved by Justice Swayne, as applicable to the present bankrupt act (*In re Neal*, 2 Bank. Reg. 82), and by Durell, J., (*In re Barrow*, 1 Bank. Reg. 125).

If the present bill had been filed in the circuit court for the district of Kansas, and service could have been had on the defendant in that district, I should for the reasons above stated, feel quite clear that I would have the power to award the writ of injunction against the defendant, and that under the circumstances it would be my duty to do so. But this bill is filed in the circuit court for the Minnesota district, and was so filed because the defendant resided in that district, and could be served with process therein, and it proceeds upon the assumption that the federal courts in Kansas by reason of the inability to serve the defendant therein, ^[508] would be unable to take jurisdiction of the suit, had it been there instituted.

I am inclined to the opinion that the circuit court for the Minnesota district has no jurisdiction over this controversy conferred upon it by the bankrupt act; and that whatever powers it has and can exercise in the present case will be in virtue of its ordinary equity jurisdiction.

By recurring to the first section of the bankrupt act, it will be seen that the "several district courts are constituted courts of bankruptcy with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy."

The powers which this section confers upon district courts are limited to cases of bankruptcy pending therein, as was very properly held by Mr. District Judge Blatchford, *In re Richardson*, 2 Bank. Reg. 74. In that case the petitioners had been adjudged bankrupts in Louisiana, and applied to the United

States *district* court for the southern district of New York for an injunction to restrain certain creditors from prosecuting a suit against them in the State courts of New York. It was denied for want of jurisdiction, the judge alluding to, but expressing no opinion upon the question whether the circuit court for the New York district, under its general equity powers, or the bankrupt court, or circuit court of Louisiana could, without further legislation, give relief. The provision of the bankrupt act as to the jurisdiction of the circuit courts is that, "the several circuit courts of the United States within and for the districts *where the proceedings in bankruptcy shall be pending*, shall have concurrent jurisdiction with the district courts of *the same district* of all suits," etc. Under this provision the circuit court of Minnesota has no bankruptcy jurisdiction in the present case, since the bankruptcy proceedings are pending in the district of Kansas. It can only exercise its ordinary equity powers, and I think it cannot be claimed, aside from its jurisdiction in bankruptcy, that a court of the United States would be warranted in enjoining a foreclosure proceeding in the State court. [509] A State court of equity in Minnesota would scarcely look with favor on an application, because the defendant resided there, to stay him from prosecuting a foreclosure suit in another State, but would leave the parties in the court which had, or was asserting, jurisdiction over them. If the bankrupt act confers no bankrupt powers with respect to the case on the circuit court for the district of Minnesota, it seems to me that it can only award an injunction on the same principle that would apply were the application made to a chancellor in the State tribunals. This point as to the jurisdiction of the Minnesota circuit court has not been prosecuted by counsel, and I therefore express only my first impressions concerning it.

Since I refuse for the present, the injunction on this ground alone, I will allow the counsel to be heard upon it if they think my impressions erroneous.

In this view of the case, it is unnecessary to give any decided opinion respecting the question, whether on a similar bill filed in the circuit court for the district of Kansas, service can rightfully be made on the defendant without the limits of the district. Under the judiciary act which limits the powers of the federal

courts to their respective districts, service within the district, or a voluntary appearance, is necessary to jurisdiction. If this limitation obtains in all suits and proceedings arising under the bankrupt act, it certainly will fail in many instances without further legislation, to meet the exigencies of particular cases, or to enable the courts to carry into effect the provisions of the statute. The power to bring creditors outside of the district within the operation of the bankruptcy court is often necessary to the exercise of the jurisdiction and powers conferred by the act; but at present I refrain from giving any opinion upon the right to serve bankruptcy process, or process in bankruptcy suits, beyond the limits of the district in which the bankruptcy proceeding is pending.

The question may be presented on an application by the [510] assignees to the bankrupt court, to sell the mortgaged estate free from encumbrance, substituting the proceeds in the place of the property sold. (See Bankrupt Act, § 25; *Dwight v. Ames*, 2 Bank. Reg. 142; *In re Neal*, 2 Bank. Reg. 82; *In re Barrow*, 1 Bank. Reg. 125.) If this section applies to such a case as the present, the provision is that "the court may, upon the petition of the assignee after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order the property to be sold under the direction of the assignee, who shall hold the funds received in the place of the estate disposed of"; not in terms, at least, limiting the notice to claimants residing in the district. Or the question may be presented by a bill like the present, filed in the circuit court for the district of Kansas, to impeach the mortgage, and asking for an injunction against further proceeding by the defendant in his foreclosure suit in Indiana. But until it arises in such a shape as to require disposition, and has been fully argued, it will be better to decline its examination or discussion. The injunction is refused, but the bill may be retained for final disposition, or dismissed, as the plaintiff's counsel may be advised.

Injunction denied.

[NOTE. — After the foregoing opinion was delivered, the foreclosure suit proceeded in the State court in Indiana, and that court rendered a decree in favor of Heaney for the full amount of his mortgage, from which the assignees took an appeal to the supreme court of the State, which is yet pending, the assignees throughout resisting and objecting to the foreclosure proceedings in the State court, on the ground of the

alleged exclusive jurisdiction of the bankrupt court. After the foreclosure decree was entered, the assignees filed their petition in the district court of the United States for the district of Kansas, under the twenty-fifth section of the bankrupt act, stating, in substance, the existence of the Heaney mortgage, that it was fraudulent both in fact and under the bankrupt act; that Heaney resided in Minnesota, and asking an order to sell the real estate free of the mortgage, and have the proceeds substituted in the place thereof. Notice of the application was served upon Heaney by the marshal of Minnesota in that State, and he appeared in the bankrupt court in Kansas, and [511] filed an answer denying the fraud alleged against him, and pleaded the proceedings and decree in Indiana to estop the assignees to relitigate the question of fraud, that question having been, as he claimed, settled and adjudicated in the State court. After hearing both parties the United States district court, on July 12, 1871, entered an order authorizing the assignees to sell the real estate in Indiana free from all liens, including the mortgage of Heaney, at public sale, after notice, and ordering them to bring the proceeds into court to be held in the place of the land, and subject to the further order of the court as to the distribution thereof, all rights of the said Heaney to the proceeds of such sale, or any part thereof, being reserved for further hearing. To this order Heaney objected; and the assignees having subsequently thereunder advertised the land for sale, to take place on the 3d day of September, 1871, Heaney filed his petition in the circuit court of the United States for the district of Kansas, under the *second* section of the bankrupt act, to review the aforementioned order of the district court, authorizing the assignees to sell the land. This petition was presented to the circuit judge in vacation; notice thereof was given to the assignees; the parties appeared before the circuit judge, at chambers, August 28, 1871, and after argument it was there held:—

1. That the order complained of was one which the circuit court could review or revise under the second section of the bankrupt act.

2. That the circuit judge had power in vacation, at his chambers, though outside of the district of Kansas, to entertain and act upon the petition of review.

3. That under the circumstances, the order of the district court would be modified as follows: The sale of the land by the assignees shall be postponed until the 30th day of October, 1871, but may then take place pursuant to the order of the district court, unless Heaney shall, before September 25, file his claim in that court or exhibit his bill therein or in this court, or institute proper proceedings in the one court or the other, to have settled between him and the assignees the question of the validity of his mortgage and the amount due thereon; this being done no sale shall take place during the pendency of such proceedings, either by the assignees, under the order of the district court, or by Heaney, under his decree.

The circuit judge reiterated the views expressed in the foregoing opinion as to the power and rightful jurisdiction of the federal courts to superintend the enforcement of all claims against the bankrupt after the adjudication of bankruptcy; but expressed no opinion as to the effect of the assignees entering an appearance in the State court, nor upon the question whether the decree therein concluded them from attacking the mortgage for fraud.

As to jurisdiction of State and federal courts: *Johnson v. Bishop*, 1 Woolw. 324; *Clark v. Binniger*, 9 Am. Law Reg. (N. S.) 304, and note; same controversy, 9 Am. Law Reg. (N. S.) 207; 3 Bank. Reg. 122; *Sharman v. Howell*, 40 Ga. 257; *Re Schnepf*, 7 Am. Law Reg. N. S. 204; *Irving v. Hughes*, 7 Am. Law Reg. N. S. 209.]

Assignee in Bankruptcy is Entitled to Collect Assets of Bankrupt, and to enforce payment by action.—Cited, *Jobbins v. Montague*, 6 Bank. Reg. 517; *In re Stansell*, 6 Bank. Reg. 185; *Paine v. Caldwell*, 6 Bank. Reg. 568; *Lamb v. Damron*, 7 Bank. Reg. 511, 512; *In re Brinkman*, 7 Bank. Reg. 210; *In re Cal. Pac. R. R. Co.* 11 Bank. Reg. 207; *Sutherland v. Lake Sup. S. C. Ry. Co.* 9 Bank. Reg. 310; *Shearman v. Bingham*, 1 Low. 575; S. C. 5 Bank. Reg. 35; *Stanley v. Sutherland*, 54 Ind. 349. Questioned, *Goodall v. Tuttle*, 3 Biss. 236, 237; S. C. 7 Bank. Reg. 210.

[513] PHELPS v. LOYHED: PHELPS v. FARRINGTON.

MORTGAGE FORECLOSURE—GENERAL EXECUTION—RULE 92.—Under rule 92 adopted by the supreme court, the power of the circuit court, in suits for the foreclosure of mortgages, to order a general execution for any balance remaining after the sale of the mortgaged premises is a discretionary one; and the court in one case refused to enter such an order where the complainant, by reason of his delay, was not entitled to it under the State statute; but it granted such an order in another case although under the State statute an action at law on the notes was barred.

Before DILLON, J., and NELSON, J.

THESE two suits are by the same plaintiff to foreclose two mortgages respectively executed by the defendants at the dates stated in the opinion of the court.

The question in each case was, whether the decree of foreclosure should order a general execution for any balance which might remain after the sale of the mortgaged estate.

The facts, and the provisions and rules of law applicable to the question, appear in the opinion.

John B. Sanborn, for the Complainant.

Gordon E. Cole, for Loyhed.

Mitchell & Yale, for Farrington.

DILLON, *Circuit Judge*.—In *Phelps v. Loyhed*, the bill is to foreclose a mortgage dated May 1, 1858, securing a note falling due May 1, 1859. In *Phelps v. Farrington*, the bill is to foreclose a mortgage securing a note which matured in 1862. Both suits were commenced in this court in 1870. The only question in the cases is, whether the decrees shall order a general execution for any balance which may remain after selling the mortgaged estate.

By the statute in force when the mortgages were made, and down to this time, an action at law upon the notes is barred [513] in six years. (Stats. 1849–58, p. 532; Rev. 1866, p. 450.) Actions for relief were to be commenced in ten years, and this ten years' limitation applied to suits to foreclose mortgages. This is plain, and has been so decided by the supreme court of the State. (Consol. Stats. p. 533; *Ozmun v. Reynolds*, 11 Minn. 459.)

By statute in force when the mortgages were made, and until the revision of 1866, it was enacted that the "court should have power to decree the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied, after a sale of the mortgaged premises, *in the cases in which such balance is recoverable at law.*" (Consol. Stats. 1858, p. 671.) By statute of the State also, it is enacted that, "no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall be given, the remedies of the mortgagee shall be confined to the land mentioned in the mortgage." (Consol. Stats. 1858, 398.)

After the decisions in *Noonan v. Lee*, 2 Black, 499, 1862, and *Orchard v. Hughes*, 1 Wall. 73, 1863, the supreme court of the United States, by rule (adopted April 18, 1864), provided that, "in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same," etc. Prior to this rule, which was adopted after the notes and mortgages in question became due, the circuit courts of the United States had no power to order an execution for any deficit remaining after the sale of the mortgaged estate.

The rule does not require the court to render decrees for such balance, but it simply authorizes decrees of this character. If the foreclosure in the Loyhed case were in the State court, it is quite indisputable that it would be precluded by ^[514] the statutory provisions above mentioned from awarding the general execution which the complainant asks. Admitting that we may have the power under the rule of the supreme court to enter a decree for any balance which may be found due over and above the proceeds of the sale, it is a power discretionary in its nature, and one which, in the case against Loyhed, ought not, under the circumstances, to be exercised.

As to the Farrington Case: Under the legislation of the State in 1866, repealing the provision found in the Acts of 1858

(p. 671, above quoted), limiting a personal judgment for the balance to cases where it is recoverable at law, and substituting therefor a special mode of foreclosure requiring a decree for the *amount due*, a sale, an execution for the balance, etc. (Rev. 1866, pp. 565, 566), and providing (as amended in 1870) that "actions to foreclose mortgages upon real estate shall be commenced within ten years after the cause of action accrues," we are of opinion that, in a bill to foreclose, filed after six years but within ten years from the maturity of the note, the plaintiff would be entitled to an order for a general execution for any residuum of the debt not made by the sale.

In other words, under the revision of 1866, as amended, the debt subsists in full force for all the purposes of a foreclosure for the full term of ten years, and in an action brought within that time in the State courts, though brought after six years from the maturity of the note, the mortgagee would be entitled to a decree in accordance with title 2 of chapter 81, including a right to a general execution, pursuant to section 30 thereof.

In the suit against Farrington, we will enter a decree awarding a general execution for any balance which may remain after the sale of the mortgaged premises.

Ordered accordingly.

[515] VON GLAHN v. VARRENNE.

STATE INSOLVENT LAWS—ALIEN CREDITORS—DISCHARGE.—State insolvent acts are valid as to subsequent contracts between citizens or inhabitants of the State enacting the law; and a discharge of the debtor thereunder is as binding upon an *alien* creditor residing or domiciled in the State at the time when the contract was made and the discharge granted as it would be upon creditors who were naturalized aliens or native born citizens residing in the State.

VALIDITY OF STATE INSOLVENT LAWS.—The grounds upon which the validity of State insolvent laws are sustained, discussed.

Before MILLER, J., and DILLON, J.

THE present action is brought upon a judgment rendered September 20, 1856, in favor of the plaintiff and against the defendants in one of the *State* courts of Minnesota. That judgment was rendered upon a promissory note, dated St. Paul,

Minnesota, December 17, 1856, made by the defendants Banfiel & Rice, and indorsed to the plaintiff by the defendant Varrenne. This judgment is regular and was obtained upon personal service. Banfiel & Rice and Varrenne are all made defendants in the present action. Banfiel is not served; Rice, though served, makes no defense; but Varrenne files an answer pleading his discharge under the State insolvent law of Minnesota, which discharge was obtained subsequent to the rendition of the judgment upon which the plaintiff declares, but before the commencement of this action.

To show the jurisdiction of this court in the present case, the plaintiff alleges in his complaint that "on the 1st day of December, A. D. 1856, he (the plaintiff) was and still is a subject of the king of Hanover, in Germany, and an alien; that the said defendants, Charles R. Rice and Alfred Varrenne, during all that time have been and now are each citizens of the State of Minnesota, and the said defendant, Banfiel, is, and for a long time past has been, a citizen of the State of Wisconsin."

[516] The defendant Varrenne was discharged under the insolvent law of Minnesota, June 6, 1861. The present action was brought September 19, 1868.

The parties waived a trial by jury, and submitted the cause to the court upon the pleadings, which, in substance, disclosed the foregoing facts, upon the record of the judgment on which suit is brought, and of the insolvent proceedings, and upon the following agreed statement of facts, namely:—

1. That the plaintiff is now and ever has been an alien; but when the debt was created—which was in the State of Minnesota—on which the judgment in suit was obtained, and when said judgment was rendered, and also when said insolvent proceedings by said Varrenne were commenced, and also at the time he was discharged under those proceedings, the plaintiff, though an alien, was a resident of the State of Minnesota, and the said Varrenne was at said date a citizen and resident of said State.

2. That the said insolvent proceedings under the State law, and also the defendant's discharge thereunder, are regular; the plaintiff's debt was scheduled by the defendant; but the plaintiff became no party to such proceedings other than being made a

party and notified by publication; he never appeared to said proceedings or received a dividend thereunder; and the question is, whether those proceedings, under these circumstances, are effectual against, or operate upon, the plaintiff.

Lampreys, for the Plaintiff.

R. B. Galusha, for the Defendant, Varrenne.

DILLON, *Circuit Judge*.—The debt from the defendant to the plaintiff was created in the State of Minnesota, in the year 1856. At that time, and down to the year 1858, when the plaintiff obtained his judgment against the defendant, in the courts of Minnesota, and down to the year 1861, when the defendant obtained his discharge under the State insolvent [517] act, both of the parties to the suit were residents of that State, the plaintiff a resident alien, the defendant a resident citizen.

The proceedings in insolvency under the Minnesota act, and the defendant's discharge thereunder, are admitted to be regular, and if these proceedings and this discharge operate upon and bind the plaintiff, he cannot recover. Whether the discharge is a valid defense to the plaintiff's judgment is the question presented for our determination.

It is provided in the constitution that, "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States." By that instrument Congress is also authorized to regulate commerce among the States, and the States are prohibited from passing laws impairing the obligation of contracts. Based upon these and other provisions of the constitution, it was at one time strongly argued that no State could pass any insolvent law, that is, any law which, without payment or satisfaction of the debt, and without the creditor's consent, discharged the debtor of his obligation to pay. The question had to be settled by the supreme court of the United States, and different phases of it were settled at different times.

In *Sturges v. Crowninshield*, 4 Wheat. 122, State insolvent laws were adjudged invalid as to *pre-existing* contracts. Subsequently came the great case of *Ogden v. Saunders*, 12 Wheat.

213, 1827. That case held that such laws were not unconstitutional, as respects *subsequent* contracts between persons of the same State. Mr. Webster, of counsel in the case last cited, made a very powerful argument against their validity, even to this limited extent. (Webs. Works, Little & Brown's ed., vol. 6, p. 24, *et seq.*) The opinion that such laws are valid as to subsequent contracts between citizens of the State enacting the law, seems never to have had the approval of his judgment. Speaking of this subject, in the Senate, as late as 1840, he said: "It is true that it has been decided that, in regard to contracts entered into after the passage of ^[518] any State bankrupt law, between the citizens of the State having such law, and sued in the State courts, a State discharge may prevail. So far effect has been given to State laws. I have great respect, habitually, for judicial decisions; but it has nevertheless, I must say, always appeared to me that the distinctions on which these decisions are founded are slender, and that they evade, without answering, the objections founded on the great political and commercial objects intended to be secured by this part of the constitution." (5 Webster's Works, 19.) It is quite plain, I think, that the judgment of this great constitutional lawyer was against the validity of State insolvent laws, even as respects posterior contracts between persons resident in the State enacting the law. This opinion rested upon two main propositions: 1. That any law manifestly impairs the obligation of a contract, *which* (as all insolvent laws do) *discharges the obligation without fulfilling it.* (6 Webster's Works, 26.) 2. That it is not true that existing laws enter into and become parts of contracts made thereunder so as to give them their obligatory force; but on the contrary, he contended that contracts derived their sacredness and obligation from universal and not merely statutory law; and that the constitution intended to protect *all* contracts, past and future, from invasion by State legislation.

Without pursuing the matter further, it is here sufficient to observe that the court decided against this reasoning, and established the validity of State insolvent laws as respects subsequent contracts made between citizens or inhabitants of the State. This result was reached upon the ground, largely, if not wholly, that every contract made in a State has relation to the existing

law of the State, which, so to speak, becomes part of the contract, and since the insolvent law declares a right on the part of the debtor to be discharged from contracts thereafter made on certain terms, the exercise of such right cannot be said to impair the obligation of the contract. This reasoning of the court has been referred to because it will ^[519] aid us in deciding the question presented in the case at bar.

It is now settled by the decisions of the supreme court (*Ogden v. Saunders*, *supra*; *Cook v. Moffat*, 5 How. 309; *Boyle v. Zacharie*, 6 Peters, 348; *Baldwin v. Hale*, 1 Wall. 223; S. C. 3 Am. Law Reg. (N. S.) 462, and note) that State insolvent laws are wholly ineffectual against non-residents of the State, even though the contract was, by its terms, to be performed in the State granting the discharge, unless, indeed, such non-resident creditor voluntarily becomes a party to the insolvent proceedings, or claims or accepts a dividend thereunder.

The cases below cited authorize the law relating to discharges under insolvent acts, and the reasons for it to be thus stated, viz., that the debt attends the person of the creditor, no matter in what State the debt originated or is made payable; that a creditor cannot be compelled by a State of which he is not a citizen or resident, or in which he has not his domicile, to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential; that notice is requisite to jurisdiction in insolvent proceedings, and can no more be given in such cases than in personal actions where the party to be notified resides out of the State, and hence a discharge under a State insolvent act cannot discharge a debt due to a non-resident, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceedings, or claims a dividend thereunder. (*Baldwin v. Hale*, 1 Wall. 223, 1863; S. C. 3 Am. Law Reg. (N. S.) 462, and note by Judge Redfield; *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie*, 6 Peters, 348; *Cook v. Moffat*, 5 How. 310; *Suydam v. Broadnax*, 14 Peters, 75; and see also the following decisions in the State and circuit courts: *Hawley v. Hunt*, 27 Iowa, 303; S. C. Am. Law Reg. (N. S.) 546; *Donnelly v. Corbett*, 7 N. Y. 500; *Felch v. Bugbee*, 48 Me. 9; S. C. 9 Am. Law Reg. (O. S.) 104; *Beers*

v. *Rhea*, 5 Tex. 349; *Poe v. Duck*, 5 Md. 1; *Anderson* ^[520] v. *Wheeler*, 25 Conn. 603; *Crow v. Coons*, 27 Mo. 512; *Pugh v. Brussel*, 2 Blackf. 394; *Beer v. Hooper*, 32 Miss. 246; *Woodhull v. Wagner*, Bald. 300; *Byrd v. Badger*, 1 McAll. 263; 2 Story Const. § 1300; Conflict Laws, § 341; 2 Kent Com. 503; *Kelly v. Drury*, 9 Allen, 27, overruling *Scribner v. Fisher*, 2 Gray, 43; and following *Baldwin v. Hale*, *supra*.) It being agreed that the discharge in question is regular, and it being settled that the insolvent law of Minnesota is valid as to contracts thereafter made in that State, and between citizens thereof, it is not seriously controverted, nor does it admit of doubt, that the defense relied on is effectual to bar the plaintiff's recovery, unless for some reason the plaintiff is not bound by the insolvent proceedings.

The only reason urged by his counsel why he is not bound thereby is, that though he was a *resident* of the State, both when the debt was created and the insolvent proceedings were had, he was not a *citizen* of it, but an alien or unnaturalized foreigner. In support of this position counsel refer to the language used by judges in some of the cases above cited. Thus in the leading case of *Ogden v. Saunders*, the second opinion of Mr. Justice Johnson (12 Wheat. 258) was concurred in on the general question, and settled the law therein (Curtis Digest, p. 114, § 4; *Boyle v. Zacharie*, 6 Peters, 348, 643; *Cook v. Moffat*, 5 How. 310; *Baldwin v. Hale*, *supra*, per Clifford, J.), and the principle decided is thus stated by the judge just named: "That between *citizens* of the same State, a discharge of a bankrupt by the laws of that State is valid as it affects posterior contracts; as against *citizens* of other States it is invalid as to all contracts." So in *Hawley v. Hunt*, *supra*, decided by the supreme court of Iowa, the judge delivering the opinion of the court said: "The settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under State insolvent laws, no matter where the debt originated or is made payable. In other words, the *citizenship* of the parties governs, and not the *place* where the contract was made, or where it is to be ^[521] performed." The idea designed to be expressed, by the use of such language, is, not that State insolvent laws cannot operate infraterritorially upon *all* the people or inhabitants or permanent

residents of a State as well as upon native or naturalized citizens, but the thought intended to be conveyed is, that such laws can have no extra-territorial effect, so as to operate upon the rights of non-residents of the State.

In the case before the court the creditor was a permanent resident of the State. That was his domicil. He was subject to its laws. His debt was created there. His debtor was a citizen of the same State in which the plaintiff resided. He resorted to the laws of the State to enforce the collection of his debt, and it is under those laws and in its courts that he obtained the judgment now in suit. He continued his residence in the State until after the discharge of the defendant under the State law. If the plaintiff were not an alien, it is not denied that he would be bound by that discharge. No reason is perceived why he should have any greater contract rights than a citizen of the same State. The grounds upon which the supreme court have sustained insolvent laws, viz.: that they are supposed to enter into subsequent contracts made within the State, and hence can only operate within the territory of the State, show that an alien resident in the State is as much affected by such laws as resident citizens of the State.

The *lex loci* governs, and that, in this case, is the law of Minnesota, and it is operative as to subsequent contracts upon all who reside or have their domicil in the State, irrespective of the fact of legal citizenship.

Upon the admitted facts of the case, judgment must be entered in favor of the defendant, Varrenne.

Judgment accordingly.

NELSON, J., concurs in the foregoing opinion, and MR. JUSTICE MILLER, who was present when the case was argued, but not when it was decided, agreed to the result.

DISTRICT OF IOWA.

[522] LANSING v. COUNTY TREASURER.

MUNICIPAL CORPORATIONS — MANDAMUS TO ENFORCE JUDGMENT AGAINST. —

Writs of mandamus under the laws of Iowa are appropriate and proper process to enforce judgments against public corporations; and when issued by the courts of the United States, their execution cannot lawfully be thwarted, or interfered with by the State courts.

ID. — MARSHAL OF FEDERAL COURT AS COMMISSIONER TO COLLECT TAXES. —If writs of mandamus issued by the federal courts in Iowa, commanding the proper local officers to levy and collect taxes to pay judgments against public corporations are evaded, disobeyed, or cannot be executed, the court has the power to appoint its marshal to execute the writs. (See *Welch v. Ste. Genevieve*, ante, 130.)

ID. — DISCRETIONARY AUTHORITY IN COURT. —This is a discretionary authority in the court, and the rules or circumstances which will guide the court in exercising it, considered.

TAXES — DISCRIMINATION AGAINST JUDGMENTS TO PAY RAILROAD BONDS — OBLIGATION OF CONTRACTS. —An act of the Iowa legislature, discriminating specially against taxes levied to pay judgments upon railroad bonds, was held, in view of the laws in force when the bonds were issued, to be in contravention of the provision of the constitution prohibiting States from passing laws "impairing the obligation of contracts."

[523] Before DILLON, J., and LOVE, J.

IN the cause above entitled, and in various others of a similar nature, the judgment creditors of sundry counties in this State, who have heretofore had peremptory writs of mandamus issued to the county officers to collect taxes sufficient to pay their judgments, move the court, upon affidavits and verified informations, to appoint the marshal for the district of Iowa to execute said writs and collect the said taxes in the place of the county treasurers. The other facts appear in the opinion of the court.

John N. Rogers, Grant & Smith, and Edmonds & Ransom,
for the Motion.

Rush Clark, D. C. Cloud, and Mr. Williams, contra.

DILLON, *Circuit Judge.* — Heretofore, judgments have been rendered in this court on what are termed railroad bonds and coupons, against the counties of Lee, Washington, Louisa, Muscatine, Johnson, Iowa, and Poweshiek. To enforce payment,

writs of mandamus have at previous terms been ordered to be issued, commanding the proper county officers to levy and collect taxes sufficient to pay those judgments. At a term of this court held one year ago, it was shown that the county officers of most, if not all of these counties, had either neglected or refused to levy and collect the taxes required by the mandates of this court. On being attached for contempt they gave as a reason for their non-action, that the bonds upon which the judgments in this court had been rendered were, in the opinion of the State courts, unconstitutional, and that they had been enjoined by the State courts (in proceedings to which the judgment creditors were not parties) from making the levies which this court had commanded.

[534] Following the express decision of the supreme court of the United States on the precise point, this court (MR. JUSTICE MILLER, and MR. DISTRICT JUDGE LOVE being present and concurring) then held that the State courts had no authority to enjoin or otherwise interfere with the execution of the process of this court; that injunctions issued from the State courts for that purpose were unauthorized, and in law afforded no protection to the county officers for their neglect or refusal to obey the process of this court. But under the circumstances the officers were discharged from actual arrest under the attachments for contempt, on the payment of costs, and on their promise to return home and levy the taxes required by the writs of mandamus. The returns subsequently made to the court show that they did, as promised, make orders levying the taxes; but in respect to some counties, particularly those of Lee, Johnson, and Muscatine, there is a showing made at this term that the taxes thus levied have not to any considerable extent been collected.

It has been made to appear to the court that in Lee County the efforts of the county treasurer to make the taxes have been practically defeated, and the same remain almost wholly uncollected. This has been brought about in part where personal property has been distrained by the county collector, by replevin suits commenced against him by tax payers in the State courts. It is also shown that there are combinations made to prevent the attendance of bidders at such tax sales, and to deter them

from bidding; and in one instance that an agent of one of the judgment creditors who attended at advertised sales of property was prevented by threats from bidding, and forced to leave by apprehensions of personal danger.

It also appears that since the decision of the supreme court of the United States, and also since the decision of the supreme court of the State to the effect that the process, or officers of the federal courts, cannot be enjoined or interfered with by State courts, that one or more of the State district ^[525] judges have issued injunctions against the collectors of Muscatine and Lee Counties, undertaking to prohibit them from collecting the taxes which this court has ordered to be made; and that such injunctions have been obeyed, and the collections practically prevented.

The county collector of Johnson County, in answer to an information filed against him, admits that he has not collected more than about one fifth of the levy; that he is advised and believes that combinations have been formed to prevent the compulsory collection of such taxes; that he finds it impossible, by reason of such combinations to find responsible deputies to assist in making collections, and in view of these facts he "asks the appointment of the marshal of this court to collect the said tax, or proceed under him (the county collector) to make such collection," and for direction as to the interest and penalties he shall collect.

A sworn statement of a similar character has been made at this term by the collector of the county of Muscatine, who also asks both the direction and aid of this court. Because the taxes have not been in fact collected in various counties in obedience to the mandates of this court, and because it is claimed by reason of the facts before stated, and others not recited, that it is impracticable for the county collectors to comply with the writs of mandamus which have been issued, the judgment creditors of the counties above mentioned have applied to the court for an order appointing the marshal to execute the writs of mandamus and make collections of the taxes. This is the question now before the court. That this court has the power to make such appointment, and that if the county officers either will not or cannot themselves collect the taxes, that it is the duty of the court to appoint its own officers to execute its process, are points

not longer open to controversy, because they have been precisely and definitely settled by the supreme court of the nation.

This is a power of a very delicate nature, and one which, although affirmed by the highest tribunal in the land to exist, [526] we would not feel inclined to exercise except in case of necessity. But when the necessity exists it is our duty, one from which there is no escape, to exercise the power. When does the necessity exist? Obviously when the county officers will not, or in consequence of public excitement, combinations, or suits in State courts, cannot execute the commands of the writs of this court to collect the taxes.

When a court issues its process it is bound to see that its lawful commands are neither disobeyed or evaded. That these writs of mandamus are lawful commands, and that the creditors of the counties are entitled to these writs, and also entitled to have them executed and obeyed, are no longer questions open to controversy, since they have been decided not once simply, but time and time again by the supreme court of the United States. They are settled, and any inquiry whether the supreme court of the United States ought to have settled them otherwise, is fruitless, and without any practical value. But this is not all that is settled. The supreme court of the United States has also decided that writs of mandamus are appropriate and proper process to enforce judgments against public corporations in this State; that the federal courts have the power, and that it is their duty to issue such writs; that they are in the nature of writs of execution, and that State courts have no more right to interfere with their execution than they have to interfere with the marshal when executing an ordinary *fiery facias*. This court cannot question the correctness of their decisions; and they are equally binding upon the State courts, because the decisions of the supreme court of the United States, as to the extent of jurisdiction of the federal courts, and as to the validity and conclusiveness of their judgments, and as to what process may be resorted to to enforce them, and how such process shall be executed, bind Congress, bind all the federal courts, and bind also State legislatures and State judges.

It so happens that every judge who sits in this court is a citizen of this State; and none of them have failed to express

[527] and manifest their sympathy, in all proper ways, with those counties and cities which have, unfortunately, become so heavily indebted.

It would be no act of kindness to the people of these counties and cities for this court to disregard the decisions of the supreme court or refuse to carry out the principles which it has decided, for in the end, and before long, we too would be compelled to obey its mandates. It is the superior tribunal, and we have no choice but to obey and carry out its decisions. Nor would it be an act of kindness to these cities and counties to pursue any course or to say or do anything which would encourage the hope that any change of views on the part of the supreme court was possible, or that by any litigation there remained any chance whatever to defeat the right of the bondholders to recover and collect their judgments. After a careful study of the decisions referred to, and of the grounds on which they are placed, we feel bound to say, and think it important that the people should understand, that all hope of escape from them by means of further litigation, either in the federal or State courts, is without any sort of foundation, is wholly illusory, and will deceive whoever relies upon it. So far as the State courts are concerned, they are, for the reasons before stated, utterly powerless to afford any relief, since they have no right whatever to interfere with the federal courts or their process or officers.

As respects the counties of Lee, Johnson, and Muscatine, it is the opinion of the court upon the showing made to it, that it is its duty to appoint the marshal to execute the writs of mandamus; but in the two counties last named the marshal will not proceed to act unless it shall be shown to the court or some one of its judges that the county officer is either disobeying the writ, or failing duly to cause the same to be executed. In Lee County the showing made to the court is such as to entitle the relators to have the marshal appointed and directed to act at once.

It is proper to add, that his appointment will be rescinded [528] whenever it is shown that the county officers are willing and able themselves to execute the writs of mandamus. It should be understood that the marshal is the officer of this court; that he is not subject in the execution of his official duties to the control of any proceeding or process of the State courts;

that any interference with him is unauthorized; that any resistance to him is an offense against the laws of the United States, and punishable as such in the courts of the United States, and that it is the duty of the President to support him with all the power necessary to enable him to execute the process and orders of this court. The people of Iowa are law abiding, and with this plain statement of what the law is, the members of this court gladly avail themselves of this occasion to declare that it is their firm conviction that the law will be respected and obeyed.

It only remains to add that the act of the Iowa legislature of last winter, discriminating specially against the taxes levied to pay judgments upon railroad bonds, is in contravention of the provision of the national constitution prohibiting the States from passing laws "impairing the obligation of contracts."

This is plain upon a comparison of that act with the laws in force under which the bonds were issued (Code 1861, §§ 116-124; Rev., §§ 252, 260), especially when made in the light of the decisions of the supreme court of the United States, expounding the constitutional provision above mentioned. (*Von Hoffman v. City of Quincy*, 4 Wall. 535; *Bronson v. Kinzie*, 1 How. 316; *Butz v. City of Muscatine*, 8 Wall. 575; *Lee County v. Rogers* 7 Wall. 181; *Furman v. Nichol*, 8 Wall. 44; *Woodruff v. Trapnall*, 10 How. 206.)

LOVE, J., concurs.

Ordered accordingly.

[529] [NOTE. — In *Supervisors v. Rogers*, 7 Wall. 175, the supreme court affirmed the power of the circuit court, to appoint a commissioner to levy and collect taxes to satisfy a judgment rendered therein against a public corporation. The decision rests upon the Iowa statute (Revision, § 3770), and the court did not consider whether the authority could be otherwise exercised. (See *Rusch v. Supervisors*, 1 Woolw. 813; *Welch v. Ste. Genevieve*, ante, 130.)

State Courts Cannot by Injunction stay operation of mandamus issues by federal court. — Cited, *Rees v. Watertown*, 19 Wall. 118; *Welch v. St. Genevieve*, ante, 138; *Merchants' Nat. Bk. v. Jefferson Co.*, 1 McCrary, 361.

ROGERS v. LEE COUNTY.

COUPONS—JUDGMENT—RATE OF INTEREST.—Under the statutes of Iowa, which provide, in substance, that six per cent shall be the legal rate of interest in the absence of a contract in writing fixing, in terms, a higher rate, and that “*judgments and decrees shall draw interest at the rate expressed in the contract,*” not exceeding ten per cent, a *judgment* upon coupons made in Iowa, payable in New York (where the legal rate of interest is seven per cent), but silent as to interest, or the rate thereof, should be made to draw interest at the rate of six and not seven per cent per annum.

Before DILLON, J., and LOVE, J.

THIS is an action on coupons which were attached to bonds issued by the county of Lee, in the State of Iowa, in payment of subscription to the stock of a railway company. These coupons are on their face made payable at a banking house in the city of New York, and contain no provisions whatever in relation to interest, or the rate of interest. The county having failed to answer, a default was entered, and on the assessment of damages the question arose: *At what rate should the judgment rendered on such coupons be made to draw interest?*

The rate of interest in New York where the coupons are made payable, is seven per cent. The statute of Iowa, the State where the contract was made and in which suit is brought, contains *inter alia* these provisions as to interest: [530] The rate of interest shall be six cents on the hundred, by the year, on money due by express contract, *unless a different rate be expressed in writing.* “Parties may agree in writing, for the payment of interest not exceeding ten cents on the hundred by the year.” “Interest shall be allowed on all money due on judgments and decrees at the rate of six per cent per annum, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the *rate expressed in the contract*; but no judgment or decree shall draw more than ten per cent per annum, which rate must be expressed in the judgment or decree. (Revision of Iowa, 1860, §§ 1787, 1788, 1789.)

J. N. Rogers, H. Scott Howell, Grant & Smith, for the Plaintiff.

No appearance for the county.

DILLON, *Circuit Judge*.—Under the statute of the State six per cent is the legal and ordinary rate of interest. But parties may by contract in writing stipulate for any rate of interest not exceeding ten per cent; but unless there is a written agreement, six per cent is the rate both upon money due on contract or on judgments and decrees.

If the coupon was payable with seven per cent interest, "*expressed in the contract*," the judgment to be rendered thereon should, under the statute, draw the same rate of interest. But no rate is expressed in the contract, and this is necessary under the statute in order to give the creditor the right to insist that the judgment shall bear a greater rate of interest than six per cent.

The point not being controverted, it is conceded for the purposes of this case, that our statute does not affect the general rule that where a contract is silent as to the rate of interest, and is in terms made payable in another State, the implication of law is that the parties contemplated that the laws [531] of the other State as to rate of interest should apply, and if so, the debt would draw interest from maturity to date of judgment at seven per cent; but as no rate is expressed in the contract, the judgment itself can only draw interest at the rate of six per cent per annum.

LOVE, J., concurs.

Judgment accordingly.

[NOTE.—The above ruling was concurred in, after argument, by MR. JUSTICE MILLER, at the May term, 1871.]

MENZELL v. RAILWAY COMPANY.

COMMON CARRIER — LIMITATION OF LIABILITY.—A contract between a railway company and the shipper of goods, limiting the common law liability of the company as a carrier, will have no greater operation given to it than the language used plainly shows the parties must have intended that it should have.

ID.—SPECIAL CONTRACT CONSTRUED.—A special contract of this character construed; and held not to exempt the company for a *total loss* of the goods *by fire*, while in the *warehouse of the company*, at an *intermediate station*, on the line of transportation.

Before DILLON, C. J.

THE plaintiff brought this action to recover of the defendant, the Chicago & Northwestern Railway Company, the value of certain goods which he alleges that on or about the 7th day of September, 1868, he delivered to it in Oshkosh, in Wisconsin, to be transported to Marshalltown, in Iowa. The defendant is alleged, in the petition, to be a common carrier, operating its road between these two places.

The answer admits that the defendant is a common carrier, and that it was operating a line of railroad between Oshkosh and Marshalltown, but it does not admit the receipt of the [582] goods or the value thereof, as claimed by the plaintiff. The answer also admits "that on or about September 7, 1868, at Oshkosh station, Wisconsin, the plaintiff delivered to the defendant a lot of household goods and furniture to be transported to Marshalltown, in Iowa, on the defendant's railway." And it sets up a *special contract*, dated September 7, 1867, signed by the plaintiff, by which, "in consideration of the company transporting the property to *Chicago* station," the plaintiff "does hereby release the said company, and each and every other company, over whose lines said goods may pass to destination, from any and all *damages* that may occur to said goods, arising from *leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains, or of cars being thrown from the track while on transit.*" The contract gives the company the right to send the goods on arrival at their *destination* (Marshalltown) to a warehouse, after the lapse of a certain time, without payment of charges. After setting out this release or contract the answer alleges that in course of transportation at Chicago it was necessary to put the goods in the defendant's warehouse or freight depot at that place, and that while there the said building accidentally took fire and the goods of the plaintiff were destroyed, without any fault or neglect on the part of the defendant.

No written reply is filed, because the statute of the State (adopted as the practice of this court) dispenses with a reply, and provides that "new matter in the answer shall (without any written pleading) be deemed controverted by the adverse

party as upon a direct denial, or *avoidance*. (Rev. of Iowa, § 2917.)

Under this statute the plaintiff on the trial claimed to avoid the effect of the written release or special contract set up in the answer, by insisting that it was procured by fraud or deception, he being a German and not able to read English, and not knowing or having had explained to him the nature of the instrument, and being ignorant thereof. The plaintiff also claimed that if the goods were consumed by fire that the ^[533] fire was owing to the fault or negligence of the company, in storing them in an exposed warehouse containing inflammable articles, without being duly guarded or watched. The plaintiff also insisted that this special contract is not binding upon him because there was no consideration therefor. He also maintained that as a matter of law the instrument does not undertake to exempt the company for loss by fire while the goods were in the warehouse at Chicago, an intermediate station on the line of transportation.

Certain facts admitted on the trial, or not controverted, may be here noticed. It is not denied that on the afternoon or evening of Monday, September 7, 1868, at Oshkosh, the plaintiff delivered to the defendant's agent certain boxes and packages for transportation, and that the company received them and agreed to transport them for the plaintiff to Marshalltown, Iowa. The goods arrived at Chicago on Friday, September 11th, in the afternoon, the distance being one hundred and ninety-three miles. Chicago is the end of the Wisconsin division of the defendant's road; and the evidence shows as to goods not in bulk (like the present), that the usual course of business of the company is to reship them at Chicago, putting them into and passing them *through their warehouse*. The goods of the plaintiff were put by the defendants into their warehouse or freight depot, on Saturday, the 12th of September. On the afternoon of the succeeding day (Sunday) the warehouse containing the goods took fire and the goods were consumed thereby.

The trial was to a jury before DILLON, circuit judge. Both parties produced evidence in relation to the controverted questions of fact. The jury found a general verdict for the plaintiff for the value of the goods, and returned the answers to certain

questions of fact submitted to them in pursuance of the practice in the State courts of Iowa, adopted as the practice of this court, to the effect, that the special contract was procured from the defendant by fraud.

The defendant moved for a new trial on the ground that [534] the special findings, as well as the general verdict, were against the weight of evidence, and for other reasons.

Withrow & Wright, and H. C. Henderson, for the Motion.

H. E. J. Boardman, Opposed.

DILLON, *Circuit Judge*.—The motion for a new trial must be overruled. In the view I take of the case it is not necessary to consider whether the plaintiff succeeded by the fair weight of the testimony in establishing that the special contract was obtained from him by fraud. Nor is it necessary to consider whether the alleged want of any specific consideration therefor renders it inoperative, nor whether the special finding that the fire happened through the fault of the company, is so manifestly unsupported by evidence as to make it the duty of the court to set it aside.

On the admitted facts of the case, conceding the validity of the special contract on which the defendant rests, and that it is binding upon the plaintiff, and that the fire was purely accidental, it is still my opinion, as it was on the trial, that the plaintiff is entitled to recover.

By the common law a public carrier is liable to the owner of the goods, though they are without fault, on the part of the carrier, destroyed by fire while in the course of transportation. The contract between the plaintiff and the defendant is admitted in the answer to be to carry the goods from Oshkosh to Marshalltown; and the goods were burned at Chicago, an intermediate station, and while the defendant sustained towards the plaintiff the relation of a common carrier. Hence, the defendant is *prima facie* liable to the plaintiff for the value of his goods destroyed by the fire, but to avoid such liability the company sets up and relies upon the above-mentioned special contract, signed by the plaintiff.

The strict responsibility to which the common law holds pub-

lic carriers is, in my judgment, founded upon a sound and [535] enlightened public policy, and is salutary in its operation; and although it is admitted that it is competent for the shipper and the company, in the absence of prohibitory legislation, to make a special contract, limiting, to a reasonable extent, the common law liability of the latter, yet the courts construe these contracts somewhat strictly; at all events, give to them no greater operation than the words used plainly show that the parties must have intended they should have. Therefore, if the plaintiff, for a consideration, had knowingly entered into a contract with the company, specifically releasing it from all liability for loss of the goods by accidental fire, without fault on its part, while in transit, such a contract, it is conceded, would be binding upon the plaintiff. But did the plaintiff in this make any such contract? This involves a construction of the special contract set up by the company. The language is, "I hereby release said company from any and all *damage* that may occur to said goods, arising from leakage or decay, chafing or breakage, or (and this is the language relied on) *from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit.*"

Construing this general and indefinite language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a *total loss or destruction* of the goods *by fire* while in the warehouse of the company at an intermediate station on the line of transportation; and therefore this agreement (admitting that it was knowingly entered into by the plaintiff, and founded upon a sufficient consideration) does not relieve the company from liability for the loss of the goods by fire, even though the fire were accidental, and without fault on the part of the company, its agents, or servants.

Judgment on the verdict.

[536] CITY OF MUSCATINE v. MISSISSIPPI & MISSOURI RAILROAD COMPANY ET AL.

COUNTY OF MUSCATINE v. SAME.

LETZ ET AL. v. G. W. CLARK, U. S. MARSHAL ET AL.

FRAUD—INJUNCTION TO STAY PROCESS.—Matters, such as fraud, which should have been pleaded as a defense, are not sufficient grounds after judgment, upon which to apply to equity to enjoin process to collect the judgment.

NEGOTIABLE BONDS—FRAUD AS A DEFENSE.—Fraud of the payee is no defense to negotiable bonds in the hands of innocent holders for value, before due.

JUDGMENT—MISTAKE—REMEDY—INJUNCTION.—Where, by reason of complainant's own carelessness (no fraud or malfeasance in this behalf being charged against the creditor), judgment in an action on coupons is, by clerical mistake, rendered for too large a sum, a proper remedy of the creditor is to apply to the court which rendered it to have it corrected, and where the alleged mistake was not plainly shown, and if it existed, could not have happened except for the debtors' laches, and no application had been made to correct the judgment, an injunction, to restrain process to enforce such judgment, was denied.

PRINCIPAL AND SURETY—PROCESS—INJUNCTION.—A creditor having an obligation of a principal debtor and a surety, may pursue his remedy against both for the satisfaction of the debt; and if the creditor has reduced his claim against the primary debtor to judgment, equity will not enjoin process to enforce the judgment at the instance of such debtor on the ground that the creditor is also pursuing surety and has seized a fund, which is in litigation, belonging to the surety; but the creditor can have only one satisfaction.

TAXATION—EXEMPTION OF RAILROADS—VALIDITY.—Conceding a statute of a State exempting railroad companies from their due proportion of taxation to be unconstitutional, the omission, pursuant to such statute, to tax the property of railroad companies the same as that of individuals, does not render void a tax levied upon the property of others which is liable to taxation; and hence the owner of property properly assessed cannot, on the ground that other property subject to taxation is omitted to be assessed, enjoin the collection of taxes against his own property.

CONSTITUTIONAL LAW—TAXATION—UNIFORMITY.—Where a State constitution requires all general laws to be uniform in their operation, and all laws for the assessment and collection of taxes to be general and of uniform operation throughout the State, and that the property of all corporations shall be subject to taxation the same as that of individuals, *quere*, whether it is competent for the legislature to tax railway corporations on their earnings, while the bulk of the other property in the State is taxed upon its value?

ID.—(*Gilman v. Sheboygan*, 2 Black, 510, commented on by MR. JUSTICE MILLER, and the statute in question in that case distinguished.)

[537] Before MR. JUSTICE MILLER, at Chambers.

IN the three causes above entitled, application at chambers was made by the complainants to MR. JUSTICE MILLER, one of the judges of the circuit court of the United States for the district of Iowa, for writs of injunction to restrain further proceedings to collect taxes to pay certain judgments severally

rendered against the city of Muscatine, against the county of Muscatine, and against the county of Louisa.

These judgments were rendered against the afore-mentioned public corporations by the United States circuit court for the district of Iowa, upon coupons attached to what are known as *railroad bonds*, that is, bonds issued by these corporations in payment for their subscription to the capital stock of certain railway companies.

At the May term, 1870, of the said circuit court, on a showing made to it, the court (DILLON, circuit judge, and LOVE, district judge, being present), entered an order appointing the marshal to collect the taxes to pay certain judgments against various counties, and among others, against the said county of Louisa, and that officer entered upon the execution of this duty in the county last named, and it was for this reason that the marshal was made a defendant in the bill filed by Letz and other tax payers of that county.

The facts respecting the *Mark Howard Case*, mentioned in the opinion, are briefly these: The city and county of Muscatine severally issued their bonds in payment for their subscription to the stock of the M. & M. R. R. Co. (made a defendant in the bills of complaint), and by virtue thereof became stockholders in said railroad corporation. These bonds, the said railroad corporation guaranteed before they negotiated them, so that a holder thereof had the liability of the city and county as principal debtors, and the railroad company as guarantors. All of the property and franchises of this ^[538] railroad corporation were subsequently sold on a decree foreclosing a mortgage thereon, and there was a *surplus* which would belong to the stockholders, and among other stockholders to the city and county of Muscatine; but before it came into their hands it was seized by proper process to answer these judgments against the city and county. That fund is still in the hands of the receiver, and the litigation in respect thereto is yet undetermined.

Concerning the constitutional question referred to in the opinion, it may be here mentioned that the constitution of Iowa contains the following provisions. Art. 1, § 6: "All laws of a general nature shall have a uniform operation." Art. 3, § 29: "The general assembly shall not pass local or special laws in the following cases: For the assessment and collection

of taxes for State, county, or road purposes; . . . and all such laws shall be general, and of uniform operation throughout the State." Art. 7, § 7. "Every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." Art. 8, § 2: "*The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.*"

A statute of the State of Iowa, *general* in the sense that it applies to *all* railroad corporations, and not *especially* to any one of them, provides that they shall pay into the State treasury as taxes one per cent each year of their gross receipts in lieu of all taxes. (Acts 1862, 227; and see Acts 1870, 109.)

The provision of the constitution of the State of Wisconsin referred to in the opinion, is in these words, art. 8, § 1: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

The opinion of MR. JUSTICE MILLER was pronounced orally, and, in substance, as below given.

D. C. Cloud, for the Motion.

Grant & Smith, contra.

[539] MR. JUSTICE MILLER. — These are applications to me as a judge of the supreme court and of the circuit court of the United States, for the district of Iowa, for injunctions to restrain further proceedings in the collection of certain taxes which have been assessed against citizens of the counties mentioned, and of the city of Muscatine. These taxes have been levied and are in process of collection in pursuance of writs of mandamus from the circuit court for the payment of numerous judgments against the city and the two counties aforesaid.

A bill of complaint in each case has been filed, and the answers, though not filed, are before me and sworn to, and are supported by affidavits. These will be sent to the clerk by me, to be filed with the bills of complaint.

The bills in the cases of the city and county of Muscatine seek relief upon substantially the same grounds, and will be considered together. These grounds are:—

1. That the bonds on which the judgments are founded, and

for the payment of which the taxes are levied, were without consideration, and obtained by fraud.

2. That the judgments are for more than they ought to be.

3. That the judgment creditors have a decree for funds now in the hands of the receiver of the circuit court, on account of the same debt for which the taxes are levied.

In regard to the first ground of relief, it may very well be doubted whether the bill shows any fraud or failure of consideration which should be a defense to the bonds either in law or equity. When the allegations are examined closely they seem to amount to more than a failure of the railroad company to which the bonds were first issued, to comply with certain promises made at the time of the transaction.

If, however, they could be held sufficient as allegations of fraud and failure of consideration, there are two very sufficient answers to them in this application.

1. They are no defense to the bonds in the hands of innocent holders.

2. They were proper defenses, if good at all, to the action [540] in which the judgments were rendered, and cannot be set up against the enforcement of these judgments now.

3. The judgments as to which these injunctions are sought are numerous, and the plaintiffs in them are different persons in most of the cases. The bill alleges that in some of these judgments, without specifying which, the amounts are too large. That is shown by the absence of coupons from the clerk's office in which the judgments are found, and that a rate of interest too large was calculated in some cases. The judgments in which these supposed mistakes were made are not specified. Indeed the complainants say they have no means of determining in which of the judgments the mistakes were made, but they arrive at the conclusion that judgments on the whole have been rendered for more than the corporations were liable in *these suits*, by a conjectural calculation based on the coupons not sued on, and the amount originally issued.

A court of chancery can hardly be expected to restrain the collection of the judgment of A B, because there is error in the judgment of C D, nor can the force of this proposition be avoided, by alleging that there is error in the judgment of A B

or C D, and therefore both of them shall be enjoined. Besides, as the only error worth notice is one of clerical mistake, and one which never could have been made without gross carelessness on the part of the complainants in this suit, the only remedy is to apply to the court to correct the calculations. The absence of the coupons for which the judgment was rendered from the clerk's office cannot be assumed to imply that they were not present when the judgment was rendered, though it is certainly true that they should then have been cancelled and filed.

4. In regard to the funds in the hands of the receiver in the *Mark Howard Case*, it is certainly true that when paid to the judgment creditors it will operate as a discharge of so much of the judgments on which the tax proceedings are based as those creditors shall receive on account of these judgments. [541] The fund is one which was designed to go to the county and city, as well as other stockholders in the railroad company. Before it came to their hands it was seized and held to answer these judgments against the city and county, and if appropriated to that purpose pays so much of that debt. But the judgment creditors have not received that fund as yet. It is still in litigation. They are pursuing their remedy against it, as also against the city and county at the same time. This they have an undoubted right to do, and especially against the latter, as they are the primary obligors. It is also provided in the decree that when the debt is paid the city and county shall be subrogated to all the rights of these judgment creditors in regard thereto.

The right of the creditor to pursue his remedy in each case, until satisfaction of his debt, is clear upon all the authorities, and no harm can come to the present complainants from this course, as upon payment from either fund, whether complete or partial, on application to the circuit court the judgment creditors will be restrained from any further use of their judgments or decrees to the prejudice of these complainants. It is proper to add that the portion of this fund which any of these creditors may receive can in no case exceed one sixth of the amount of the judgments which they are seeking to collect of the city and county.

In the case of the citizens of Louisa County the usual allegations of fraud in obtaining the bonds by the parties to whom

they were originally issued, are made. This is concluded by the judgment on those bonds. It is further alleged that Fellows, the principal judgment creditor, bought his bonds after the courts of Iowa had judicially held them void. This defense cannot now be set up against the judgment. The allegation is expressly denied in the answer, and this is supported by the affidavit of a witness, who says he knows Fellows purchased before such a decision was made. It is further alleged that two railroad corporations have in Louisa County a large amount of valuable property amounting to one fourth of ^[542] the taxable property within the county, which is not assessed by the officers who are collecting this tax; although by law it is liable to its share of the tax.

As the tax complained of is being collected under the order of the federal court, and as the evident tendency of all that has been said by the supreme court in regard to these corporation debts, implies that no interference by State courts will be permitted in enforcing the tax, the statement here made presents a very grave question for the consideration of the court which is collecting the tax by its agents. I have had more difficulty on this point than on any which has been presented in these applications.

A statute of Iowa exempts railroad property from all other taxes except one per cent per annum paid into the State treasury. The constitution of the State declares that all taxation shall be uniform. Whether this constitutional provision (the exact terms of which I have not attempted to state) renders the statute void, is a question upon which the supreme court of this State has twice, as I am informed, been equally divided. If the question was presented to the circuit court by way of supervisory control over the officers, who, under its command, are collecting this tax, whether this railroad property should be assessed the same as other property, I confess I do not see how it could avoid deciding it. But, instead of an order to assess the property, I am asked to declare all other assessments void, because it is not assessed. This, it will be seen, is a very different question; and it is clear that I can only enjoin its collection on the ground that it is void. The case of *Gilman v. Sheboygan*, 2 Black, 510, is relied on as authority for the latter proposition. In that case, after the city

of Sheboygan had issued bonds in aid of a railroad, the legislature of that State passed an act, declaring that the tax to pay these bonds should be assessed exclusively on the real estate of the city. The constitution of Wisconsin has a provision similar to the one referred to in the constitution of Iowa, and the supreme court of the United States held that this attempt ^[543] to make a part only of the taxable property of the city responsible for this particular debt, was a violation of the constitution which rendered the tax levied under that statute void.

In the case before us there is no attempt to render any species of property liable to taxation for any specific debt, or class of debts, but an exemption of the railroad from all other burdens, in consideration of a definite sum, which may be more or less than its share of such burden. Whether this exemption be forbidden by the constitution or not, I am quite clear that it does not render void the tax which is levied upon other property.

The case of *Gilman v. Sheboygan* does not go so far as this, either in the facts on which it is grounded or the reasons by which the judgment was sustained. There is a manifest difference between an attempt to impose the entire burden of a debt already incurred by a municipality, upon a particular species of property, and the attempt to exempt a species of property from all other taxation, in consideration of a sum supposed to be its just share of the general public burden.

It is not inappropriate to look to the consequences of holding that this failure to assess the railroads renders all other tax void. It applies to the tax assessed for all other purposes as well as this tax. Every non-resident holder of property in the State could apply to me and insist on an injunction against the tax on his property. And if the State judges believe it to be void, they would be bound on the same principle to suspend the collection of all taxes throughout the entire State. A proposition which leads inevitably to such a result cannot be sound. I cannot therefore grant an injunction on this ground, whether the railroad property is liable to taxation or not. It is alleged that the officers are collecting the penalties for failure to pay the tax, according to this law as it stood before the act of last winter, which provides that only seven per cent should be collected in this class of cases.

Whether this is right or not, I do not pretend to decide. [544] It is matter for application to the court for direction, and I am informed that the course pursued is one prescribed by the court at its last term. It is clearly no foundation for an injunction.

Injunction denied.

[NOTE. — After this decision, denying the injunction, upon assurances given to the circuit judge, by the county authorities, that if the marshal were withdrawn, they would proceed to collect taxes to pay the judgments, the execution of the order appointing the marshal was suspended, and the required taxes were collected by the county officers.

That the State courts cannot interfere with the federal courts in enforcing the collection of taxes to pay judgments against municipalities. (*Riggs v. Johnson Co.* 6 Wall. 166; *Lansing v. County Treasurer*, ante, 522.)

That they will not attempt to do so. (*Ex parte Holman*, 28 Iowa, 88.)

As to uniformity of taxation and mode of taxing property of corporations under the Iowa constitution. (*City of Davenport v. Railroad Co.* 16 Iowa, 348.) Of express and telegraph companies. (*Express Co. v. Ellyson*, 28 Iowa, 370, 380.)

Construction of the provision in the constitution of Wisconsin referred to in the foregoing opinion, see *Railroad Co. v. Supervisors*, 3 Am. Law Reg. 679; *Gilman v. Sheboygan*, 2 Black, 520. By the supreme court of Wisconsin, in *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282; *State v. Portage*, 12 Wis. 562; *Bond v. Kenosha*, 17 Wis. 284; *Dean v. Gleason*, 16 Wis. 1; *Carter v. Dow*, 16 Wis. 298; *Fire Department Milwaukee v. Helfenstine*, 16 Wis. 136; *Brightman v. Kirner*, 22 Wis. 54.

Constitutionality of bonds issued by municipalities in aid of railways, and defenses thereto. *Gilchrist v. Little Rock*, ante, 261, and note; *King v. Wilson*, post.]

IN RE RICHTER'S ESTATE.

BANKRUPTCY — EFFECT OF FRAUDULENT PREFERENCE. — Where an assignee brings his action under the thirty-fifth section of the bankrupt act, to recover of a creditor of the bankrupt property alleged to have been sold or conveyed to him in fraud of the act, and where the defendant in such action denies his liability, resists a recovery, goes to trial, and judgment passes against him, such a judgment conclusively establishes that the creditor sought to obtain a fraudulent preference, and disentitles him to prove up against the estate of the bankrupt, the [545] debt or claim on account of which he received the fraudulent preference. Payment of such a judgment under execution issued is not such a surrender as is contemplated by section twenty-three of the act, and will not entitle the party to prove up the claim in satisfaction of which he received property from the bankrupt by way of illegal preference.

BANKRUPT ACT — SECTIONS TWENTY-THREE AND THIRTY-NINE CONSTRUED. — Sections twenty-three and thirty-nine of the bankrupt act commented on, and construed to stand together.

FRAUDULENT PREFERENCE — EFFECT OF. — Where the debt or claim on account of which the illegal preference is received is single and entire, the creditor is entitled to no dividends thereon, though it may have been proved up or allowed before the judgment was obtained which established the fraudulent character of

preference; but if he has two disconnected debts, receiving a fraudulent preference as to one only, will not affect his right to prove up the other or to receive dividends thereon.

Id. — CURRENT ACCOUNT.— An open running account for merchandise sold, consisting of various items of charges and credits at different times, on which was credited the amount at which the property was purchased by way of fraudulent preference, leaving a balance which was proved up before the register against the bankrupt's estate, was held *prima facie* to be but a single debt or claim, and by reason of such preference disentitled to any dividend on any part thereof.

Before DILLON, C. J.

THE following are the facts as they appear from the evidence in the case:—

Richter was adjudged a bankrupt on his petition, filed on the 19th day of October, 1868. Cragin is the assignee in bankruptcy. The present controversy is between the assignee and Messrs. Greenwald & Co., who are by far the largest creditors of the bankrupt, and to whom the latter, *three days* before filing his petition to be adjudicated a bankrupt, sold and transferred his stock of goods, which embraced, and appears from the inventory, nearly all his property, not exempt from execution. Greenwald & Co. filed their claim before the register to be proved against the estate. It consists of a running account for goods and merchandise sold by them, they being merchants, at various times during the ^[546] years 1867 and 1868, to the bankrupt, who was also a merchant. The total debt side of the account is—

	\$5,984.62
Various credits.....	2,983.10
	<hr/>
Balance.....	\$3,001.52
Oct. 16, 1868. By mdse.....	1,471.88
	<hr/>
Balance.....	\$1,529.64

Accompanying this account filed with the register was the following statement, sworn to by Greenwald & Co., to wit: Richter owed us for goods sold \$3,001.52; but on the 16th day of October, 1868, he sold and delivered to us the stock of goods belonging to him for \$1,471.88, leaving a balance due us of \$1,529.64. Their debt was proved up and allowed against the estate, in this amount, viz., \$1,529.64, and constitutes nearly

one half of all the claims established against it. Subsequently, in April, 1869, the assignee commenced an action against said Greenwald & Co., in the district court of the United States for the district of Iowa, to recover the value of the stock of goods which Greenwald & Co., had thus purchased of the bankrupt.

The petition in said action, in substance, alleges that Richter was adjudged a bankrupt on his own petition, October 19, 1868; that Cragin was appointed assignee, November 21, 1868; that on the 16th day of October, 1868, Greenwald & Co., defendants, claiming to be creditors of Richter, took and received from a transfer of a large amount of goods, being his whole stock in trade as a retail merchant, of the value of \$3,500, the said transfer being made out of the ordinary course of business, and with a view to prevent said property from being distributed to the creditors of the bankrupt, and to evade the bankrupt act; the said Greenwald & Co. having, as alleged, at the time of receiving such transfer reasonable cause to believe the said Richter to be insolvent. The petition further alleges want of assets to pay debts ^[547] proved, a demand for the goods of Greenwald & Co.; their neglect and refusal to surrender them, thereby they have converted them to their own use; wherefore the assignee prays a judgment for their value.

Greenwald & Co. filed an answer, denying the allegations of the petition. At the November term, 1869, of the district court, a trial of this action on these issues was had, resulting in a verdict and judgment for the assignee against Greenwald & Co., for \$1,566.31, which judgment was never set aside or reversed. Execution was immediately issued, and on the same day the marshal made return thereon that he had received the full amount thereof from Greenwald & Co. After this judgment was rendered, and at the same term, Greenwald & Co. made in the district court a motion as follows: "Now come the said Greenwald & Co., and the court having found the goods of the said Richter were taken by them for the benefit of all of his creditors, move the court *for leave to prove up the balance of their claim*, viz., \$1,471.88, being the amount credited to said Richter, Oct. 16, 1868, when said goods were obtained."

This motion was overruled by the district court, and from its judgment thereon, denying to Greenwald & Co. the right to

establish the balance of their debt, an appeal is taken by them to this court.

After the aforementioned judgment was rendered in favor of the assignee against Greenwald & Co., for the value of the goods, the assignee, by his counsel, moved the district court "for an order vacating and setting aside the allowance heretofore made of the claim of Greenwald & Co. against the estate of said bankrupt, and directing the assignee not to pay over any dividend to them on the claim proved by them."

This motion is based upon the legal effect of the said judgment in favor of the assignee against Greenwald & Co., which conclusively establishes, as the motion claims, that the latter sought to obtain an illegal preference in fraud of the bankrupt act." The district court sustained this motion, and ^[548] made an order declaring that Greenwald & Co. were not entitled to any dividend or share in the bankrupt's estate upon the debt theretofore proven against it, and directing the assignee not to pay them any dividend thereon. From this order the said Greenwald & Co., also appeal.

Shiras, Van Duzee & Henderson, for the Assignee.

Roberts & Fouke, for Greenwald & Co., Appellants.

DILLON, *Circuit Judge*.—1. *As to the motion of Greenwald & Co.* The cardinal idea of the bankrupt act is an indiscriminating distribution of all of the effects of the debtor to all of his creditors. This legislation is essentially founded upon the doctrine that *equality is equity*. When a debtor finds himself embarrassed, experience has shown that there arises in his mind a strong temptation, either to conceal his property, or to distribute it as his favor or his enmity, or both may dictate. When creditors perceive their debtor's embarrassment, concert of action for the mutual benefit of themselves and the debtor becomes almost impossible, and the most vigilant or the most unfeeling seek an advantage or priority by means of writs of attachments, or other legal process, or by obtaining mortgages or confessions of judgment. Recognizing the essential equality of right of all the creditors of a common debtor, and the duty of the latter, if he cannot pay all in full, to pay all in equal

proportions, and the practical impossibility of accomplishing full and equal distribution without stringent provisions, the bankrupt act prohibits the debtor from making, and the creditor (having reasonable cause to believe the debtor to be insolvent), from accepting any preference, in money or property, directly or indirectly, absolutely or conditionally, which contravenes the policy, or has the effect to defeat the purposes of the act.

The temptation to prefer, and the danger of doing so, inhere in the situation of an insolvent debtor; and hence it is (to use language applied to purchases of trust property by ^[549] trustees) "the wise policy of the law has put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation." (Notes to *Fox v. Mackreth*, 1 Lead. Cas. in Eq. 115.)

The eighteenth, twenty-third, twenty-ninth, thirty-fifth, and thirty-ninth sections of the bankrupt act abundantly evince the anxiety of the legislature to guard against preferences, which operate as a fraud upon the policy of the act. Such preferences are not only prohibited and declared void, but certain penalties are denounced against creditors who, under the circumstances specified, accept of preferences. Thus it is declared that such a creditor shall not "vote for or be eligible as assignee (§ 14), and "shall not prove his debt in bankruptcy" (§ 39, and compare § 23), and shall be liable to the assignee for the money or property received. (§ 35.)

In the case now under consideration, the debtor, a retail merchant, three days before filing his petition to be adjudicated a bankrupt, sold his whole stock of goods to Greenwald & Co., his largest creditors. The assignee of the bankrupt, after his appointment, commenced, under the thirty-fifth section of the bankrupt act, an action against Greenwald & Co. to recover the value of the goods which the bankrupt had transferred to them, in fraud, as it was alleged, of the provisions of that act. The petition in that action made the averments required by the law; among others, Richter's insolvency, his sale of his whole stock of goods to Greenwald & Co., out of the usual course of business, his intent to evade and defeat the bankrupt act, and the purchaser's reasonable cause to believe their vendor to be insolvent, etc. Issue was taken upon these allegations; the jury

found for the assignee, and judgment was rendered accordingly, and the amount of the judgment was paid by Greenwald & Co. to the marshal on execution, but it was paid promptly on the same day the execution issued, or the next. And it is the effect of this judgment upon the rights of Greenwald & Co. as creditors of the bankrupt, that we are now to consider. And first we may ^[550] remark that this judgment, as between the estate of the bankrupt and Greenwald & Co. conclusively establishes that the purchase of the stock of goods by them from the bankrupt was made in fraud of the bankrupt act. This is *res judicata*, and Greenwald & Co. are estopped to deny it. To entitle the assignee to a recovery in that suit, he would have to establish:—

1. That Richter, when insolvent, or in contemplation of insolvency, made the transfer.

2. That he made it with a view to give Greenwald & Co. a preference.

3. That they had at the time reasonable cause to believe he was insolvent, and that it was made in fraud of the act, or to defeat or evade its provisions.

Having recovered, it is conclusively presumed that the assignee did establish each of these propositions, and if so, he then necessarily established that Greenwald & Co. sought to get a preference or advantage over other creditors, which was fraudulent in the contemplation of the bankrupt act. Greenwald & Co., having accepted a fraudulent preference, the question is, how does it effect their claim or debt, and their rights as creditors? The answer to this is given in the twenty-third and thirty-ninth sections of the act. By the former section it is enacted that the creditor accepting a fraudulent preference “shall not prove the debt on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.”

By the latter section named, it is enacted, without qualification, that a creditor receiving a fraudulent preference “shall not be allowed to prove his debt in bankruptcy,” and nothing is said about allowing proof of the debt, in case the creditor sur-

renders to the assignee the property, etc., received by way of preference. It is a settled principle of law that where there is a positive repugnancy between two sections ^[551] of the same act, the last governs, as presumptively the latest expression of the legislative will. This rule is highly artificial, and is never to be applied where its application is not necessary. Another, and much more reasonable rule of law is that a statute shall be so construed, if possible, that all of its provisions may stand; and in this case it is possible to give effect to sections 23 and 39; either first by holding the former applicable to constructive, and the latter to actual and intentional, frauds; or second, by holding the former applicable alone to cases of voluntary, and the latter alone to cases of involuntary, bankruptcy; or third—which would seem to be the correct view—construing the two in *pari materia*, applicable to both classes of bankruptcies, and to all cases falling within their terms, which would, by construction, annex the qualification in section 23 to the proviso in section 39, and both sections thus construed should, as far as applicable by their terms, be applied to cases arising under section 35 of the act. But this is a point on which we need not longer dwell or give any positive opinion, since we will assume in favor of Greenwald & Co. that section 23, which relates specifically to preferences, is the one which governs their rights. By this it is declared that whoever receives a fraudulent preference “shall not prove the debt or claim on account of which the preference was made or given, nor receive any dividend therefrom until he shall have first surrendered to the assignee all property received by him under such preference.”

Under these circumstances, and with this provision in force, Greenwald & Co. made the motion to prove up the balance of their claim, of the denial of which they now complain. Note the motion: It is “for leave to prove up the balance of their claim, viz., \$1,471.88, being the amount credited Richter, October 16, 1868, when said goods were obtained.”

The statute is that they shall not prove up the debt or claim on account of which the preference was given. It was ^[552] this precisely which, by the motion under consideration, they sought to have done, and which the court refused to allow.

It is urged by the claimants that this refusal was erroneous

because they had, before the time when they made their motion, surrendered to the assignee all property received by them under the preference. This devolves upon us the duty of interpreting the meaning of the word "surrender," as it is here used. And it is our opinion, that a creditor who receives goods by way of fraudulent preference, and who refuses the demand therefor which the assignee is authorized to make (§ 15), denies his liability, allows suit to be commenced by the assignee, defends it, goes to trial, is defeated and judgment passes against him, which he satisfies on execution, cannot be said within the meaning of the statute, to have surrendered to the assignee the property received by him under such preference.

He has surrendered nothing. He accepted a fraudulent preference and defended it to the last. Paying a judgment which he stoutly resisted, and from which he could not escape, is not such a surrender as the statute contemplates. To hold that it was, would be against the spirit of the statute, which is to discourage preferences. Such a holding would manifestly encourage them, for if the transaction should be upheld the creditor would profit, if overthrown, he would lose nothing, and stand upon an equal footing with those over whom he had attempted to secure an illegal advantage, and whom he has, by litigation, delayed in the collection of their claims.

As a further argument in favor of this view, it may be suggested that the statute equally prohibits the *accepting* and the *giving* of a fraudulent preference. The fraud of the debtor in this respect is punished by disentitling him to a discharge. (§ 29.) It would seem strange if the law provided no penalty against the creditor who participated in the fraud upon the act; and there is no penalty or punishment, if the view of the statute contended for by the appellants' counsel be correct.

[553] As a further argument in support of the opinion above expressed, it may be urged that when section 23 is read in connection with sections 35 and 39, all being in *pari materia*, it will be seen that the surrender provided for in section 23 is an act to be done by the creditor before the recovery of a judgment against him, as provided by section 35. That is, the assignee may demand of the creditor the property received by him; if he surrenders it, he stands upon the same plane as the creditors,

and may prove his debt and receive his dividends. If he refuses to surrender it, the assignee may sue as provided in section 35, and if he recovers, and payment be made on an execution, this is not a surrender (which implies voluntary action on the part of the creditor), but a refusal to surrender. So that the bankrupt act says decisively to every person who, under the circumstances specified, has received a preference: "Surrender what you have received and you shall lose nothing. If you refuse, and the assignee recovers the property or its value, you shall get nothing. Make your election." When this election may be made we are not now required to decide, further than to hold that it is too late to make it after the recovery of judgment by the assignee. (*In re Tonkin and Trewartha*, 4 Bank. Reg. 13.)

2. *As to the motion of the assignee.* It will be recollected that the balance of the debt due Greenwald & Co. after deducting the goods purchased, viz., \$1,529.63, was proved up and allowed against the estate of the bankrupt prior to the determination of the action of the assignee against Greenwald & Co., for the value of the goods purchased by the latter of the bankrupt.

After the judgment in favor of the assignee, the latter moved the district court "to vacate and set aside" the allowance of the sum of \$1,529.64, and for an order "directing the assignee not to pay over any dividend" to Greenwald & Co. on this claim.

The twenty-third section of the act declares that if any person [554] shall accept a preference contrary to the provisions of the act, he "shall not prove the debt on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, etc., . . . received by him under such preference." The court sustained the motion of the assignee, and made an order that he pay no dividends to Greenwald & Co. on that part of their claim which had been previously allowed.

If the debt of Greenwald & Co. was single and entire, the effect of the judgment recovered against them by the assignee was to establish, as an adjudicated fact, that they had received a fraudulent preference in respect to such debt; and if so, they are not entitled to receive any dividend, though their claim may have been previously allowed, they having failed, as above

held, to surrender to the assignee the property received under the preference they accepted from their debtor.

The statute is express that such creditor shall neither prove his debt nor receive any dividend therefrom, until he shall have first surrendered, etc. This leaves no room for construction, and the mere fact that the claim was proved up before the register, anterior to the time when the assignee recovered the judgment which established the fraudulent character of the preference, is immaterial.

And here it is proper to be noticed that it is "the debt or claim on account of which the preference was made or given" that shall not be proved, or be entitled to dividends, not some other and unconnected debt. If the debt is single and entire, the illegal preference affects the whole of it, though the property received does not equal it in value. But otherwise, if in their origin or by contract, the debts of the creditor are not single and entire, but divided or divisible and disconnected, and the creditor receives a preference distinctly as to one and not the other; for here he would be entitled to dividends on the one and not on the other. (See *Secor v. Sturgis*, ^[555] 16 N. Y. 548; *Sweeney v. Daugherty*, 23 Iowa, 293.) The claim of Greenwald & Co. as filed with the register, consisted of a running and apparently continuous account, made up of items of goods purchased at various times. *Prima facie*, as stated, it constituted but one "debt or claim" within the meaning of the bankrupt act, and hence there was no error in the ruling of the court that, by reason of the fraudulent preference they had accepted, they were not entitled to any dividend in respect to their debt. If they had applied to show that the debt preferred was disconnected from, and not the same debt as that which was proved up, the court would doubtless have granted the application, but apparently it was otherwise, and the court ruled correctly. Its ruling on the motion under consideration is affirmed. It would still be in the power of the district court to allow Greenwald & Co. to show, if they can, that the debt on account of which they received the preference is not the same as that which they proved before the register. If this is shown, the order made would be set aside; if not, it would of course stand. The orders appealed from are both affirmed.

Affirmed. '

Note. Creditor Receiving Fraudulent Preference May Surrender property and prove up debt.—Cited, *In re Holland*, 8 Bank. Reg. 192; *In re Leland*, 7 Ben. 164.

KING ET AL v. WILSON ET AL.

RELATION OF STATE AND FEDERAL COURTS.—The federal courts, sitting in a State, follow the latest decision of the highest tribunal of the State, as to validity and construction of a State statute; and the case is an exceptional one in which the federal court is justified in holding a statute void, because in conflict with the constitution of the State after the supreme court of the State has pronounced it to be valid.

ID.—CONSTRUCTION OF STATE CONSTITUTION.—The latest decision of the State supreme court, holding that the citizen might constitutionally be taxed, and the proceeds given as a gratuity or donation to aid in the building of the roads of private railway companies, was followed, although that decision overruled a long and settled course of adjudication by the same tribunal the other way, and the prior decisions were regarded as sound expositions of the constitution of the State.

[556] **ID.—RAILROAD AID TAX LAW.**—The case made in the bill involving no contract made upon the faith of the prior decisions of the State court, does not fall within the exception to the rule recognized by the United States supreme court in the Iowa bond cases. (*Gelpcke Case*, 1 Wall. 175; *Butz v. Muscatine*, 8 Wall. 575.)

JURISDICTION — PARTIES — CITIZENSHIP.—While it may be true that non-resident tax payers, citizens of different States, may join in a bill in equity to enjoin the collection of an illegal tax on their several property, it seems, as to each so entitled to join, that there must be in dispute an amount exceeding five hundred dollars.

Before DILLON, C. J., at Chambers.

ON motion for injunction. This is a bill in equity filed in the circuit court of the United States for the district of Iowa, asking for an injunction to restrain the collection of a railroad tax on the property of the complainants, situate in Marion Township, Linn County, Iowa.

The plaintiffs, several in number, allege that they are, respectively, citizens of Kansas, Indiana, Ohio, and Missouri. The defendants are the county treasurer, and the township trustees and clerk.

The bill alleges, in substance, that "the matters in controversy herein exceed the sum of five hundred dollars, exclusive of costs; that the plaintiffs are severally the owners of a large

amount of real estate in Marion Township, Linn County, Iowa, and that they unite for the purpose of bringing this suit; that the taxes levied thereon, and whose collection is sought to be restrained, amount to the sum of fifteen hundred dollars."

'The bill sets out the act of the Iowa legislature of April 12, 1870 (Laws of 1870, p. 105), which by its terms authorizes townships, towns, and cities to vote, by a majority of the votes polled at the election, a tax for the benefit of, and payable to, the railroad company intended to be aided thereby, the municipal or public corporation, or the tax payer thus voting aid, getting no stock or other specific thing in return, nor ^[557] anything except the incidental benefits resulting from the building of the road.

It alleges that in August last, under color of this act, a five per cent tax was voted, and subsequently levied in favor of the Sabula, Ackley & Dakota Railroad Company on the property of the plaintiffs, situated in the afore-mentioned township. The bill charges that the Act of April 12, 1870, is void, because in conflict with the constitution of the United States, and that of the State of Iowa, and that the defendants will enforce the collection of the tax thus voted and levied, unless restrained. The prayer is for a preliminary injunction against the collection of the tax, and that it be made perpetual on the hearing. The present application is for an order allowing a temporary injunction.

Scott & Ercanbrack, and Rush Clark, for the Complainants.

W. G. Thompson, and Edmonds & Ransom, for the Defendants.

DILLON, *Circuit Judge*. — This application presents a question of great moment, and one which both parties have joined in asking to have decided upon its merits.

The bill is brought upon the ground that the Act of April 12, 1870 (Laws 1870, p. 105), authorizing townships, towns, and cities to vote a tax upon the property of all persons situated therein for the benefit of, and to be absolutely given to, the railway company, whose road is intended to be aided, is void, because in conflict with the constitution of the United States, and that of the State of Iowa.

It is claimed to violate that provision of the fifth article of the amendments to the constitution of the United States which declares that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." [558] But these limitations apply alone to the exercise of power by the government of the United States, and have no reference to the State governments. (*Barron v. Baltimore*, 7 Peters, 243.)

But it is chiefly insisted that the act is void because it is in conflict with the constitution of the State, and in support of this objection the counsel for the complainants rely upon the decisions of the supreme court of the State, hereafter referred to, and which they maintain settle the question in this State against the constitutional validity of legislation of the character of the act in question. On the other hand, the counsel for the defendants contend that the last decisions of the supreme court of the State, made a few months since, are in favor of the validity of the act, and they insist that it is the duty of the federal court, sitting in Iowa, to follow these without examination, because the question relates solely to a statute of the State, and they are the very latest decisions of its highest tribunal on the subjects.

To this the complainants reply that the decisions referred to, though the latest, are not the "latest settled adjudications," and that it is not the duty of the federal courts to follow against a long line of decisions the other way, decisions just made, and which, in the language of the supreme court of the United States, may prove but oscillations in the course of the final judicial settlement of the question. (*Gelpcke v. Dubuque*, 1 Wall. 175, 205.) Thus it becomes necessary to ascertain what has been decided by the supreme court of the State, with reference to the constitutional competency of the legislature to authorize taxation of the property of the citizen to aid in the construction of the roads of private railway corporations in the vicinity of the property to be taxed.

In 1853, the supreme court of the State (one judge dissenting) held the constitutional validity of bonds of counties issued to railroad companies in payment for stock subscribed. That is to say, it was then decided that there was nothing in the constitution of the State to prohibit the legislature of the [559] State

from authorizing counties to issue bonds to railroad corporations in return, or as payment for stock subscribed, and to pay the debt thus created by taxes levied on the property owners of the county. (*Dubuque Case*, 4 Greene, 1.)

Under this decision the counties and cities of the State issued their bonds for millions of dollars in aid of various railway enterprises. In 1862, the question of the legal liability to pay these bonds came before the supreme court of the State for determination, in the well known *Wapello County Case*, 13 Iowa, 388; and the court, on full consideration, held such bonds to be unconstitutional.

That the supreme court of the State has ever decided such legislation unconstitutional has recently been controverted, and so it becomes necessary to examine the question. On examining the *Wapello County Case*, I find it so clear that the constitutional question was decided, that it ought to be sufficient to refer the reader to the case itself. After a lengthy discussion of the question, Lowe, J., for the court, states the result on this point thus: "For the various reasons which we have herein stated, we have to say that we are deliberately of the opinion, that the general assembly of the State cannot pass a valid law authorizing counties in their corporate capacities to become stockholders in railroad companies."

Every lawyer in the State knows that this opinion was understood to decide the constitutional question; and from that day to this, neither in the supreme court of the State, nor in any inferior tribunal, has any judgment of recovery been rendered on such bonds, though many of them were either authorized or ratified by express legislative act, as I shall hereafter show. At the next term (December, 1862), the *Wapello Case* was followed, and the question that there can be no recovery on coupons declared to have been "settled so far as this court is concerned." (*Myers v. Johnson Co.* 14 Iowa, 47.)

At the same term an injunction to restrain county officers [560] from levying and collecting taxes to pay interest on railroad bonds was asked, and a final decree entered in the supreme court agreeably to the prayer of the petition. (*McMillan v. Boyles*, 14 Iowa, 107.) At the next December term (1863), in *Smith v. Henry Co.* 15 Iowa, 385, the plaintiff sought to recover

against the county on coupons, and a demurrer to his petition was sustained. In affirming the judgment and referring to the *Wapello County Case*, and other cases following it, Wright, J., said: "The want of power under our constitution and laws is so clear that we cannot longer regard it as open for controversy. In this State it must be considered settled. It is true a different ruling was made in some of the earlier cases by our predecessors, but those cases have all been examined and overruled, and this with a full consciousness of the consequences to the State and the bondholder."

The same doctrine was announced and followed at the same term in *Ten Eyck v. Keokuk*, 15 Iowa, 486. At the December term, 1865, in *Chamberlain v. Burlington*, 19 Iowa, 395, relating to the validity of city bonds to a railroad company, Cole, J., delivering the opinion of the court, remarks: "The following cases determined by this court hold that counties have no constitutional power or legislative authority to bind themselves by the issuing of bonds for railroad stock."

Without consuming time by adverting the other decisions of the supreme court of the State, to the same effect, I come down to the case of *McClure v. Owen*, 26 Iowa, 243, decided on the 17th day of December, 1868. Judge Beck, delivering the opinion of the court, said: "This court has often held that, under the constitution of the State, bonds of the character of those involved in this suit (to railway companies for stock), cannot be issued by the counties and municipal corporations, and are therefore void; that contracts of this kind are unauthorized and forbidden by the constitution, and cannot be enforced by the courts of the State." And accordingly in that case a bill to restrain the collection of a tax to pay such bonds was sustained.

[561] This was as late as the December term, 1868. At the next June term of the supreme court (1869), DILLON, Chief Justice, in *Hanson v. Vernon*, 27 Iowa, 35, after referring to the prior decisions, said: "If anything can be said to be settled in this State, it is that, under the constitution there is no legislative power to endow public or municipal corporations with the faculty of subscribing to the stock of a railroad company, and to levy a tax on the inhabitants to pay therefor. Every-

body so understands it. I have so understood it ever since I have been upon the bench, and have never felt myself at liberty to regard it as an open question. Not one of the counsel concerned in this cause has asked the court to overturn its decisions, and to hold such subscription and tax to be constitutional. It being settled then, that they are unconstitutional, it would justly disgrace this tribunal and the State, if we should hold the present act to be valid (Act of March 22, 1868, hereafter mentioned), unless it is in fact different from the other question; and in my opinion, the effort of the counsel to show a distinction in favor of the Act of 1868 has not been successful, and if any distinction can be drawn, it is one unfavorable to the act under consideration."

Thus we have numerous adjudications, and at different times, an express declaration from each judge of the supreme court of the State, that the constitutional question had not only been decided, but settled, and this line of decisions extends in an unbroken series from 1862 to 1869.

If we go beyond the State, we find that the federal courts have understood that the constitutionality of the bonds was decided and denied by the *Wapello County Case*.

Referring to that case, Mr. Justice Miller, thoroughly conversant, as a citizen of Iowa, with the whole subject, in the *Gelpcke Case*, 1 Wall. 175, 208, said: "The supreme court of Iowa, in a very elaborate and well reasoned opinion, held that there was no constitutional power in the legislature to confer such authority (to issue bonds to pay for stock in railway companies) on the counties, or any municipal corporation. [562] This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench and with unanimity."

The counsel in the cause and the opinion in the case agree that the State supreme court decided that such bonds were void, because no legislative authority could be given to issue them. The legislature of Iowa had, by the Act of January 28, 1857, expressly authorized the city to issue bonds in the *Gelpcke Case*, and hence, the only question before the court was one of constitutional power. And so in Lee County the bonds issued had been legalized by an act of the legislature (Stats. 1857, ch. 258),

and this act was held valid by the supreme court, and to have the same effect as if the power by the legislature had been antecedently conferred. (*McMillen v. County Judge*, 6 Iowa, 391.) Here there was express legislative authority for the bonds, and the court decided in that case that the tax payers could not maintain a bill to enjoin the collection of taxes to pay them. This was in 1858, before the *Wapello County Case*. After the *Wapello Case* was decided, the same case of *McMillan v. Boyles* was brought before the supreme court on a bill of review, and following the *Wapello County Case*, the same injunction which they had refused in 1858 (6 Iowa, 381, *supra*), they granted in 1862. (14 Iowa, 107.)

Here was legislative authority for the bonds, and so it is thus made as clear as a mathematical demonstration that the decision last made must have been on the ground that the bonds and tax were unconstitutional. It could have been made on no other ground, as was shown by Mr. Justice Wright, in *Hanson v. Vernon*, 27 Iowa, 64, 65.)

The legislature ratified the bonds issued by the city of Davenport (Acts 1855, p. 85), and those issued and to be issued by the city of Keokuk (Acts 1856, p. 44), and those of Fort Madison (Acts 1856, p. 73), and expressly authorized those issued by Lee County (Acts 1857, p. 227), by Dubuque (Acts 1857, p. 270), by ^[see] Clayton County (Acts 1857, p. 296, by Lee County, by two separate acts (Acts 1857, pp. 405, 415), and authorized and legalized others. (Acts 1867, p. 75; Acts 1857, p. 447.) And see also two acts approved January 28, 1855 (Laws 1855, 192; Laws, 1885, 219). They are entitled respectively, "An act regulating interest on county and city bonds," and "An act regulating the issue of county and corporate bonds."

Though there was this antecedent legislative authority in many cases, and this legislative ratification in others, no judgment on such bonds in the State courts ever was or could be obtained after the decision of the *Wapello County Case*, because it was there held that bonds of this character were void, beyond any power of the legislature to ratify or cure. Hence, after that decision, the bond holders, by necessity, were compelled to resort to the federal courts, which, as we have seen, held that they would follow the decisions of the State court in force when

the bonds were issued, and which affirmed their validity. And out of this denial of the constitutional power to issue such bonds arose the unfortunate conflict of opinion, which it was at one time feared would result in a conflict of jurisdiction between the State and the national tribunals, a controversy to which the attention of the whole country was attracted.

In view of this legislative and judicial history, it seems almost incredible that it could be claimed by any one that the supreme court of the State had never decided that such bonds were unconstitutional. Yet, in the late decision of the supreme court in *Stewart v. Polk County*, 30 Iowa, the court deny that such bonds had ever been held unconstitutional, and assert that all that was ever said on the subject was mere *dicta*. That there may be no misapprehension, I quote: "When it is remembered that until the passage of the Act of 1868, the legislature of Iowa had never passed any act purporting to authorize anything of the kind, and that no such question was before the court in the *Wapello County Case*, or in any of the other numerous cases involving the validity of ^[544] city and county railroad bonds, it will be plain enough that whatever may have been said about the constitutionality of an act authorizing the issue of bonds by municipal corporations was only *dictum*."

In this the learned court is doubly mistaken, as we have above demonstrated: 1. In that the legislature of Iowa had passed many acts, both purporting to authorize and to ratify such bonds; and, 2. The constitutional question was made and was before the court in the *Wapello County Case*, and in the numerous others hereinbefore mentioned; and the constitutional question was, as before shown, decided as late as the December term, 1868, in *McClure v. Owen*, 26 Iowa, 243.

It may therefore be confidently pronounced that from the decision of the *Wapello County Case*, in June, 1862, to the decision in *McClure v. Owen*, in December, 1868, the doctrine of the supreme court of Iowa undeniably was, that the legislature could not authorize a public corporation to issue bonds to a private railway company in payment, or in return for stock subscribed therein, and levy a tax on the inhabitants or their property to pay the debt thereby incurred.

With this settled construction of the constitution in force, the

legislature of the State passed the Act of March 22, 1868, (Laws, 1868, p. 54), entitled "An act to enable townships and incorporated towns and cities to aid in the construction of railroads." This act and that of 1870 are in substance identical, and has been so held very recently by the State supreme court. They provide that if a majority of the voters of any township, city, or town, shall, at an election, vote in favor of aiding in the construction of any railroad located as therein specified, a tax shall be levied, collectible as other taxes, not to exceed five per cent upon the assessed value of the property in the township, city, or town. This tax, when collected, forms no part of the public revenue, but it is to be paid over to the railroad company, as a gratuity or bounty, to be used by it in aid of its undertaking, without any stock, or pecuniary ^[565] or other compensation to the tax payer being provided for or contemplated.

The validity of this law came before the supreme court of the State for decision in *Hanson v. Vernon*, 27 Iowa, 28, at the June term, 1869, and the court (DILLON, C. J., WRIGHT, J., and BECK, J., concurring; COLE, J., dissenting), after full argument by a large number of the leading attorneys of the State, and mature consideration, held the act unconstitutional. It was then declared to be "absolutely impossible to hold the Act of 1868 to be void, and yet stand by the decision of the *Wapello County Case*, 13 Iowa, 388, which was that the legislature could not, under any circumstances, pass an act which will make it lawful for a city, or county, in its corporate capacity, to subscribe for stock to a railroad company." (13 Iowa, 399, 400.)

That is to say, the court had declared in the *Wapello County Case* and in numerous other cases, including *McClure v. Owen*, decided as late as the December before, that it was the law of the State that under the constitution of the State, the people could not be taxed to aid in building railroads, though stock was received in return or payment for the aid rendered. If this was so, then the court was of opinion that it was clear that they could not be taxed and receive nothing in return.

Of the soundness of that decision I have no doubt. I do not here propose to restate the grounds on which it rests. I am well satisfied with it; the more so that it was cited with

approval, and its doctrine followed soon after by the supreme court of Wisconsin, and by the supreme court of Michigan. It was made the basis of the veto of a similar law in California, and it was referred to in the constitutional convention of Illinois, and its principle adopted by the people of that State into their organic law.

The next step in this history is the re-enactment by the legislature of the State, on the 12th of April, 1870, of the Act of 1868, which had the year before been pronounced, in ^[566] *Hanson v. Vernon*, to be unconstitutional. And in October, 1870, in *Stewart v. Polk County*, the supreme court (Cole, C. J., Day, J., and Miller, J., concurring; Beck, J., dissenting), pronounce the Act of 1870 to be constitutional, overrule *Hanson v. Vernon*, yet declare their adherence to the *Wapello County Case*, and the "whole series of decisions of the court holding invalid city and county bonds" issued to railway companies. Thus we have this anomalous result as the law of the State: *It is not constitutional to tax the people to pay for the debt incurred to aid in building railroads where stock was received in return, but it is constitutional to tax them for this purpose where the tax is given as a gratuity to the railroad company, and nothing is received by the municipal corporation, or the tax payer.*

With great respect and deference to the learned judges of that court, I feel bound to say that such a result fails to secure the approval of my judgment. Under these circumstances the present application for an injunction is made to me as a judge of the United States circuit court for the district of Iowa; and the question presented to me is, What is my duty with respect to it? Is it my duty, as such a judge, to follow without examination into its soundness, the latest decision, because it is the latest? Or am I at liberty to look into the matter and follow the previous decisions, if I shall believe them to be sound expositions of law? If the latter, I should have no hesitation, and should feel obliged to allow the injunction. Upon the best reflection I have been able to give the matter, I have failed to persuade myself that I would be justified in disregarding and refusing to follow the latest decision of the supreme court.

The question, it will be observed, relates solely to the validity of the statute under the State constitution, and it is this law

which the bill seeks to have nullified by the federal court. Now, where questions arising in the federal courts depend upon State statutes, these courts sit in the State to administer State laws, and these laws are expressly made rules ⁽⁵⁵⁷⁾ of decision therein. Overruled decisions, how sound soever in principle, are nugatory in law. If the federal courts should follow overruled decisions because they believed them right, the result would be the intolerable mischief that would flow from the consequent confusion of rights, and the conflict of opinion leading to conflict of jurisdiction. A party would have a title in the one court and none in the other. Moreover, the federal courts might, by disregarding the adjudications of the State court, set up and support in the State a domestic policy repugnant to that recognized or established by the State court.

The mischief is irremediable, because these two courts, though sitting within the same jurisdiction and administering the same laws, have not, as in cases under the twenty-fifth section of the judiciary act, a common arbiter to compel uniformity of construction. The duty of the federal court to follow in such cases as the present, the latest decisions of the State court has been constantly asserted, and in some instances strikingly exemplified by the supreme court of the United States. Thus, that the court overruled two of its former decisions based on those of the State courts, and followed the latest decisions of the latter court. (*Green v. Neal*, 6 Peters, 291 ; and see, also, *United States v. Morrison*, 4 Peters, 124, and cases cited by Miller, J., 1 Wall. 207, *et seq.*) In *Leffingwell v. Warren*, 2 Black, 599, it is observed : "The construction given to a State statute by the highest judicial tribunal of such State, is regarded as part of the statute, and is as binding upon the courts of the United States as the text. . . . If the highest judicial tribunal of the State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudication."

The only modification of this principle by the supreme court has been in cases from this State, where contracts were made and rights acquired under the former decisions, and where the court, under its power and duty, as it supposed, to ⁽⁵⁵⁸⁾ protect contracts, has declined to follow the latter decisions as to prior

contracts. (*Gelpcke Case, supra; Butz v. Muscatine*, 8 Wall. 575.) The modification of the rule thus declared is exceptional in its nature, and the case now made, involving no contract or other rights vested under the previous decisions, is not within the principle of the exception.

On the question of *jurisdiction*, I am inclined to think that while it may be true that different tax payers may join in such a bill; yet, that as to each so entitled to join there must be in dispute an amount exceeding the sum or value of five hundred dollars; in other words, where the interest of each is in its nature several, and the whole amount of tax demanded or demandable of each is less than that sum, so that neither one would have the right to bring the bill alone, the requisite amount to confer jurisdiction cannot be had by aggregating the several amounts of tax each is liable to pay. (See Judiciary Act, § 11; *Adams v. Board of Commrs. etc.*, McCahon R. 235.)

But as the application is disposed of on its merits, agreeably to the desire of counsel, I pass the question of jurisdiction without any more decided expression of opinion, since in any event the result would be to deny the injunction.

Injunction denied.

Note. Federal Courts Follow State Decisions and Laws, except where in conflict with United States Constitution and laws. — Cited, *Woodman v. Latimer*, 2 Fed. Rep. 842; *Hening v. U. S. Ins. Co.* 2 Dill. 36.

BEALE v. RAILWAY COMPANY.

RAILWAY COMPANY — GROSS NEGLIGENCE — EXEMPLARY DAMAGES. — Exemplary damages may be awarded against a railway company for an accident which happens in consequences of the gross negligence or drunkenness of their servants.

Before LOVE, D. J.

[569] THIS was an action for damages caused by a collision, and was tried before LOVE, J. The negligence of the defendant's servants was admitted on the trial. The plaintiff suffered a severe and permanent injury. The jury found a verdict for five thousand dollars against the company, which moved for a new trial on the following grounds:—

1. That the court erred in instructing the jury that a corporation might be rendered liable in *punitive* damages for the gross negligence of its servants.

2. That the court erred in instructing the jury that a single case of intoxication by a railroad engineer, when on duty, in the absence of countervailing proof, raises a presumption that he is a man of intemperate habits, and the superintending officer of the company is presumed to have knowledge of the character of its employees.

Nourse & Kauffman, for the Plaintiff.

Withrow & Wright, for the Defendant.

LOVE, *District Judge*. — In overruling the motion for a new trial, held:—

1. That on the grounds of public policy and for the better security of the rights of the public, *punitive* damages can, and in certain cases ought to, be awarded against railroad corporations. *Punitive* damages, it is true, are in the nature of punishment; and it is equally true that in ordinary cases it is contrary to our ideas of justice that the defendant should receive more than compensation for the injuries he sustained, but in cases like the one at bar, although the excess above the amount of real damages goes to the plaintiff, still, it is well settled that it is one of the means of securing more care and attention on the part of corporations having great rights and privileges, that in cases of injury arising from the gross misconduct or negligence of their employees, they are liable to *punitive* damages. It is a right and interest that the public have in every prosecution of this kind, that ^[570] these companies shall be taught, so to speak, that they are held to exercise not only ordinary care but extraordinary care in the transportation of passengers, and on these grounds, courts are inclined to uphold the reasonable verdicts of juries where punitive damages are awarded.

The counsel for the defendant have suggested to the court that railroad companies should not be held liable for punitive damages for the gross negligence of one of their employees, unless notice of the character of the employee is brought to the knowledge of the company. But the complete answer to this is that

a railroad company acts only through its agents—the directors, the superintendent, and all the employees are the agents through whom alone the company acts, and unless the company are held liable for the acts of these parties, the public have neither a remedy nor security. The public have a direct interest in having these companies employ capable, honest, and reliable men, and it is the duty of the companies to see that their employees are of a proper character, or courts and juries will hold them to a strict accountability for misconduct. A railroad company employs a drunken engineer, the life and personal security of the traveling public is placed in his hands; the public can know nothing of his character, and if an accident occurs, occasioned by his negligence, inattention, or misconduct, and loss of life or limb results, the company should be held responsible for the accident thus occurring; not only in compensatory damages, but punitive damages for the want of the exercise of care in the character of the employees selected. And experience has long since demonstrated that merely compensatory damages is not sufficient to compel these companies to that care and attention that the personal safety and security of the traveling public demand.

Under the peculiar circumstances of this case the court is unable to separate the proof of the actual damages from the inference of *punitive* damages. The conduct of the agent of the company is so intimately connected with the proof of the [571] circumstances connected with, and the character of the injury received, that one cannot be excluded without the other. So that the evidence, although in its nature tending to show a reason for *punitive* damages, would be still admissible as showing the actual damages. But under the rulings of this case heretofore stated by the court, it would for other reasons be admissible.

Judgment on the verdict.

PHILIPS v. HATCH.

REBELLION—DURATION IN TEXAS.—From the nature of the question, which is regarded as political and not judicial, from the fair implication of the acts of Congress, and from the uncertainty and confusion which would ensue from any other rule: *Held*, that in contemplation of law the late rebellion continued in existence, in the State of Texas, until it was declared to be at an end, by the President in his proclamation of August 20, 1866 (14 U. S. Stats. 814); and that the courts would not inquire as a matter of fact in each case when the rebellion terminated, or hostilities ceased, but would be governed in determining it by the decision of the political department of the government.

CONTRACTS MADE DURING PENDENCY OF REBELLION.—A contract made without any license or authority from the government, during the pendency of the rebellion, between a resident of a State in insurrection and a State which “maintained a loyal adhesion to the Union” is void, both by the doctrines of international or public law, applicable to the late civil conflict, and by force of express legislative declaration.

ID.—Even after the war has terminated, the defendant in an action founded upon such a contract may plead the illegality thereof as a defense.

CIVIL WAR—LAWS APPLICABLE TO.—The principles of public law applicable to a state of war *inter gentes* have in general, in the absence of conflicting congressional legislation, been applied to legal questions arising out of the civil war between the United States and the so-called confederate government.

ID.—Various statutes of Congress, and proclamations of the President relating to the *status* of the insurrectionary States, cited and commented on by DILLON, Circuit Judge.

Before DILLON, J., and LOVE, J.

[573] THE questions in the case arise on a demurrer to the answer.

The plaintiff, in his petition alleges, that at the time of bringing his action, and at the time when the contract in suit was entered into, he was a citizen of the State of Texas, and that the defendant was, at said times, a citizen of the State of Iowa. The contract declared on is a promissory note made by the *defendant to the plaintiff*, and purports on its face to have been made in the “State of Texas,” in the “county of Montgomery,” therein, on *the 1st day of January*, 1866. The note contains a recital that it is secured by a deed of trust; and the petition contains an averment that the deed of trust has been executed and the property sold, and the proceeds of the sale (which was made out of court under a power contained in the instrument) credited on the note. To recover the balance, after allowing the credit, this action is brought.

Among other defenses, not necessary to be specially mentioned,

the defendant pleads, in substance, the following: That at the time of the making of the note sued on, the plaintiff was a citizen and inhabitant of the State of Texas, and the defendant was a citizen and resident of the State of Iowa. The answer refers to the Act of Congress of July 13, 1861, and the proclamations of the President hereafter mentioned, and alleges that the President did declare the State of Texas and the inhabitants thereof to be in actual rebellion against the United States, and that such rebellion continued to exist until the 20th day of August, 1866, when, by proclamation of the President, the state of rebellion theretofore existing in the State of Texas was declared to be suppressed. The answer also alleges that the plaintiff was a rebel, and gave aid and comfort to the enemies of the United States in armed rebellion during the time aforesaid; that he never took the oath of allegiance; and never received any permit to carry on ^[573] trade or commercial intercourse from the proper or constituted authorities of the United States; wherefore, the defendant says the contract in suit is null and void, and he prays judgment accordingly.

The plaintiff demurs, assigning as a ground therefor, that the facts pleaded do not, in law, make the note void.

Withrow & Wright, for the Demurrer.

Nourse & Kauffman, Opposed.

DILLON, *Circuit Judge*.—The contract which is here sought to be enforced was made between a citizen and resident of the State of Iowa, and a citizen and resident of the State of Texas, within the latter State, after the proclamation of the President was issued, declaring that State to be in rebellion against the United States, and before his proclamation declaring the insurrection therein to be suppressed and at an end. It appears from other portions of the record that the consideration of the note declared on was a sale by the plaintiff and a purchase by the defendant, through an attorney in fact who signed the defendant's name to the note, of certain property, and that the note was secured by a deed of trust, and the property sold in pursuance of a power of sale contained in that instrument. The question made by the demurrer is, whether a note executed

under these circumstances is valid and enforceable in the courts of the United States after the rebellion or civil war referred to in the answer is at end.

The first point necessary to be noticed is, When is the rebellion or civil war in Texas to be considered as having ended? It is a well-known historical fact, which it is supposed the court may judicially notice, that the armies of the rebellion surrendered to the forces of the United States government early in the year 1865. General Lee surrendered to General Grant, April 9, 1865. Johnston surrendered April 26, 1865, and Kirby Smith, May 26, 1865; dates, it will be^[574] observed, prior to the date of the note in suit. It is maintained by the plaintiff that the war was at an end before the note was made, and hence it is not governed, in any event, by rules of law applicable to contracts made pending a war between citizens of the opposing belligerents.

On the other hand, it is maintained by the defendant that it is not competent for the courts to inquire when *as a matter of fact* the rebellion terminated, but that the courts must follow and be governed in this respect by the decisions of the political departments of the government, and if so then the rebellion was in existence in the State of Texas until the President declared it to be at an end, which was on the 20th day of August, 1866, posterior to the date of the note, which is the foundation of the present action.

By the Act of July 13, 1861 (12 U. S. Stats. 255), the President was made the judge of what States or portions of States were in insurrection, and he was authorized to declare that fact by proclamation. The act provides that "*thereupon* all commercial intercourse . . . shall cease and be unlawful so long as such condition of hostility shall continue." The President's proclamation of August 16, 1861 (12 U. S. Stats. 1262), declared that commercial intercourse between the two sections "*is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed.*"

In the opinion of the President, the rebellion, in the State of Texas, had not ceased when he issued his proclamation of April 2, 1866 (14 U. S. Stats. 811), and it was not until the 20th day of August, 1866, that the President officially declared

it to be at an end, and to be henceforth so regarded. Since the President, and not the courts, was empowered to decide when a State was in condition of insurrection, it would seem a fair implication from the act, in the absence of a contrary provision by Congress on the subject, that the President, and not the courts, should determine how long the condition of hostility continued which rendered unlicensed intercourse unlawful.

[575] If the date fixed by the President's proclamation does not govern, then that proclamation is, in this respect, wholly nugatory, and there is no certain guide for the courts to determine when the rebellion is to be considered at an end.

From the nature of the question, which is political and not judicial; from the fair implication of the Act of July 13, 1861; from the confusion and uncertainty which would ensue from adopting any other rule, it is the opinion of the court that in the contemplation of law, the rebellion in the State of Texas must be considered as being in existence until the President declared it to be at an end in the proclamation of the 20th day of August, 1866. This view receives no little support from the judgment of the supreme court in the recent case of *United States v. Anderson*, 9 Wall. 56, which holds, that within the meaning of the "Abandoned and Captured Property Act," of March 12, 1863, the rebellion was not suppressed until August 20, 1866. Congress has also recognized the date fixed in the proclamation of August 20, 1866, as that at which the rebellion closed. (Act March 2, 1867; 14 U. S. Stats. 422, § 2; *United States v. Anderson*, *supra*.)

The contract in suit, then, is to be regarded as having been made during the existence of the rebellion, and between a resident of a State in insurrection and a resident of a State which, in the language of the above-mentioned proclamation of August 16, 1861, "maintained a loyal adhesion to the Union and the constitution." Being so made, is it valid or void? The late civil conflict, in view of the peculiar organization of this government, composed of States united into a national union, and in view of the *de facto* organization of a portion of these States into a confederacy, which raised and maintained for four years large armies, whose dominion was marked by lines of bayonets and bristling fortifications, within which the laws and authority

of the national government were practically overthrown, presented legal questions as to its nature and effect, equally novel and difficult.

[576] Were the rules and doctrines of international law at all applicable to this conflict, or were the questions arising out of it to be wholly determined by the municipal law? This general question first came before the supreme court in *The Prize Cases*, 2 Black, 635, 1862. It has since been frequently before that tribunal. (See *The Venice*, 2 Wall. 258; *Mrs. Alexander's Cotton*, 2 Wall. 404; *The Hampton*, 5 Wall. 372; *The William Bagaley*, 5 Wall. 377; *The Osachita Cotton*, 6 Wall. 521; *Hanger v. Abbott*, 6 Wall. 532; *Coppell v. Hall*, 7 Wall. 542; *Mo-Kee v. United States*, 8 Wall. 163; *The Grapeshot*, 9 Wall. 129.)

These cases all apply, or declare to be applicable, to the rebellion, the general doctrines of public law which govern in wars between independent nations. Of course, the authority of Congress to modify these doctrines as applied to States in insurrection and the inhabitants thereof would not, probably, be disputed. In determining questions arising out of the rebellion, the courts of the United States will first inquire what legislation has the Congress of the United States enacted respecting such questions. If any, the courts will be governed by it so far as it is within the constitutional competency of Congress. If none, then the general rules and doctrines of international law will be resorted to by the courts to determine the rights of the parties. What exceptions to the application of these rules and doctrines, arising out of the peculiar nature of our government and of the war, must necessarily, or should properly be made, cannot well be determined in advance.

Whether the question of the right of the parties to make the contract in suit be decided by the principles of public law applicable to a State of war *inter gentes*, or by the provisions of the act of Congress, the result is the same.

In the *Prize Cases*, Mr. Justice Nelson thus states some of the consequences resulting from a state of war between two countries: "The people of the two countries immediately become the enemies of each other; all intercourse, commercial or otherwise, unlawful; *all contracts* existing at the commencement

[577] of the war suspended, *and all made during its existence utterly void.*"

There is no dispute among publicists, jurists, or courts, respecting the soundness of the proposition that all commercial intercourse, and all contracts between the subjects or citizens of different powers, or opposing belligerents are wholly invalid. This principle of public law is vindicated by such masterly reasoning, and fortified with so much authority and research by Chancellor Kent, in his celebrated judgment in *Griswold v. Waddington*, 16 Johns. 483, that it is not necessary to do more than to refer to it. (See also Kent Com. 67; Halleck Int. Law 356; *Billgery v. Branch*, 8 Am. Law Reg. (N. S.) 334; *Willson v. Patterson*, 7 Taunt. 439; S. C. 1 J. B. Moore, 133; *Ex parte Bousemaker*, 15 Ves. 71; *Flindt v. Waters*, 15 East, 260; *The Hoop*, 1 C. Rob. Adm. 165, 200; *Potts v. Bell*, 8 Term Rep. 556; *The Rapid*, 8 Cranch, 156; *The Prize Cases*, 2 Black, 635.)

But in the case at bar it is not necessary to resort to the general doctrine of public law, for the making the contract was forbidden by the above-mentioned Act of Congress of July 13, 1861, prohibiting all unlicensed intercourse between the inhabitants of States and sections in insurrection, and the rest of the United States. Speaking of this act, Mr. Justice Davis, delivering in a recent case the opinion of the supreme court of the United States, says: "It is a familiar principle of public law that unlicensed business intercourse with an enemy during time of war is not permitted. Congress, therefore, in recognition of this principle, when it declared, on the 13th day of July, 1861, that commercial intercourse between the seceding States and the rest of the United States should cease and be unlawful after the proclamation of the President that a State of insurrection existed, *authorized* the President in his discretion, to license trade. But in so far as it was licensed it was to be conducted in accordance with regulations prescribed by the secretary of the treasury. The President proclaimed the fact of insurrection, and provided for limited [578] commercial intercourse, and the secretary of the treasury fixed the manner in which the intercourse should be carried on." (*McKee v. United States*, 8 Wall. 163. 166.)

So in reference to the effect of the Act of July 13, 1861, and the proclamation of August 16, of the same year, Mr. Justice Swayne says that thereby "commercial intercourse between the inhabitants of territory in insurrection and those of territory not in insurrection, except under the license of the President, and according to regulations prescribed by the secretary of the treasury, was entirely prohibited." (*The Osachita Cotton*, 6 Wall. 521, 531; see also *United States v. Lane*, 8 Wall. 184; *Coppell v. Hall*, 7 Wall. 542.) In the case last cited, which was one arising out of the rebellion, the court remarks: "The payment of money by a subject of one of the belligerents in the country of the other is condemned, and all contracts looking to that end are illegal and void."

It is also settled that even after the war has terminated the defendant in an action founded upon a contract made in violation of the rule of law which forbids the making of a contract with an enemy, may set up the illegality of the transaction as a defense. (*Hanger v. Abbott*, 6 Wall. 532, 535, per Clifford, J.; *Willson v. Patterson*, 7 Taunt. 439.)

It is, therefore, the opinion of the court that the answer is sufficient, and the demurrer thereto is overruled.

Demurrer overruled.

[NOTE. — See *Brown v. Hiatt*, ante, 372; *Levy v. Stewart*, 11 Wall. 244.]

Contracts Made During Rebellion between loyal citizens and residents of insurrectionary State are void. — Cited, *Williams Admr. v. Mobile Sav. Bk.* 2 Woods, 508.

[579] MARY FINLAYSON, ADMINISTRATRIX, v. THE CHICAGO, BURLINGTON, & QUINCY R. R. Co.

RAILROADS — LIABILITY FOR INJURY TO PERSONS IMPROPERLY UPON THEIR TRACK.

— A railroad company, whose train is approaching a man, walking lengthwise upon its track, which rings its bell, and sounds its whistle, in time to enable him to get off, is not liable for an injury which happens to him under such circumstances.

Id. — DUTIES AND LIABILITIES OF PARTIES. — The duties and liabilities, under such circumstances, of the company, on the one hand, and of the person injured on the other, stated by MR. JUSTICE MILLER.

Before MILLER, J., and DILLON, J.

THE plaintiff is the administratrix of her deceased husband, and brings this action under a statute of the State, to recover damages for his death, which is alleged to have been caused by the wrongful acts of the defendant. The defendant's road at the place where the accident happened runs parallel to the county road, and upon the same general level, and about thirty feet from it. The deceased had been a laborer upon the public canal, in the vicinity, and on the day he was killed had left the wagon with his wife to do some business, and the wagon passed along. The deceased, when he had finished his business, started to overtake the wagon, and went upon the railroad track instead of on the public road. He had walked along it about six hundred feet before he was injured, and was walking along it at the time of the injury. There was no reason why he did not take the public road. The railroad was in a straight line, or nearly so, for the distance above mentioned. The deceased was struck and killed by the passenger train, running on time, and which approached him from behind. There was conflicting evidence as to the distance from the deceased at which the bells were rung, and the whistle sounded, and the brakes applied. The wind was blowing in the face of the deceased, and in the direction of the approaching train. The injury did not happen at a public crossing.

[580] The trial was before MR. JUSTICE MILLER, and the circuit judge. The following is the substance of the oral charge of the presiding justice to the jury — both judges concurring:—

Gillmore & Anderson, for the Plaintiff.

Henry Strong, and Thos. F. Withrow, for the Defendant.

MR. JUSTICE MILLER.—This case which you have heard with patience, and which has been very ably presented to you, belongs to a class which is becoming very common in this country. All great motive agencies, when brought into dense communities, endanger life and property to some extent. Railroads, in their motive power, and in the manner in which they are necessarily conducted, are powerful instruments of good, and, also, to some extent, of evil. It is, or it ought to be, the object of all good citizens, to increase the good and to diminish the evil.

Those of you who have traveled here from a distance to attend this term of court, on railroads, and who remember the inconvenience, and, I might say, the suffering of the same journey in the old stage coaches, can well appreciate the good which railroads do; and those of you have listened to the detailed testimony in this case have seen the capacity of a railroad for evil. There can be no question, however, but that they are necessary and useful. We should, therefore, by a just administration of the law, so far as it depends upon courts and juries, and by proper legislation, so far as it depends upon legislative bodies, do all we can to diminish the evils which seem, in some sense, to be incidental to these great motive powers.

I am, gentlemen, happy in the consciousness that I am addressing a jury who will consider the case before it without being influenced by any prejudice against railroads, on the one hand, or by any undue sympathy for the unfortunate woman who is the plaintiff in this case, while you would do her full and complete justice. If the case presented to you is, [581] unfortunately, not altogether new in some of its features, certainly not new in the fact that human life has been destroyed by a railroad train, it is, on the other hand, according to the researches of counsel engaged in the case, novel in one feature at least; and that is, that those researches have not enabled counsel to present any reported case where suit has been brought to recover for an injury to the person, received while the party was walking along on the track of the railroad company voluntarily. In that respect the case before you is novel, and presents to me, at all events, who am to declare the law applicable to it, something of an embarrassing question.

The action upon which you are now to render a verdict is founded essentially in its nature upon the charge of negligence on the part of the railroad company in performing some duty which is required of them by law, in regard to the transaction presented to you. But this class of cases nearly always presents two questions which are correlative, and this case is not an exception to that general rule. These questions relate in the first place to the negligence and want of care on the part of the defendant, and in the second place to the care and diligence on the part of the plaintiff. The first question to be determined

is, whether the defendant, in the sense of the law, has been negligent in regard to the transaction which has been presented to you, and if this is found to be so, the second question arises whether the plaintiff, on his part, used such care and diligence that he is exempt from blame in the matter. In the case before you, then, you are first to consider whether, under all the circumstances, the defendants were guilty of negligence. The question of negligence, by which, of course, is always meant that want of care and diligence which it is the duty of a party to observe, is always one which must be considered in regard to the circumstances. There is no absolute rule of negligence or diligence. The diligence required of a party is, that care and attention to the matter in hand which an ordinarily prudent, careful man would exercise ^[582] in regard to his own transactions. In this case the uncontradicted evidence on both sides is, that the man who was killed was walking on the track of the defendant corporation along the same course the train was going that struck and killed him, and the question arises, what decree of precaution or care a railroad company or its servants are bound to take to guard against injuring a man under such circumstances.

I instruct you as a matter of law, in the first place, that the officers of this corporation, the men who had charge of this train, had a right to presume that this man was a man of sound mind and good hearing, and that the case is not to be considered by you in regard to the diligence of these officers as if he were a dumb man, known to the parties, nor as if he were a child which the parties could see was incapable of taking care of itself.

I instruct you that the agents of the railroad company had a right to suppose he was such a man, of sound mind and sound hearing, and that he would take reasonable care to protect himself in case of danger. Under that view of the case, I further say to you that these agents or officers of the company were bound to give a reasonable and fair notice of their approach, when they found that the man was not taking steps to get out of the way—such a notice as would reach a man under ordinary circumstances of good hearing, and who had his attention alive to his situation. If, then, you believe that the bell was rung and that the whistle was sounded, in time to enable this man to

get off the track, these parties are guiltless, and the company is not liable. If, on the other hand, you believe they delayed making any signal at all until it was entirely too late for him to get off the track, that they being aware of his presence, delayed to ring the bell or sound the whistle, until he could not have stepped aside and saved himself—in that case there was negligence on the part of these employees, for which the railroad company is responsible. And I further say to you that the fact that in the place, and at the time where this accident occurred, there was a noise arising ⁽⁵⁸³⁾ from the work on the canal, and a confusion arising from other trains running along the canal bank they were working on, which might be confounded with other trains, and that this fact was well known to the man who was killed, does not vary the matter. That was reason for additional care and diligence on his part; for knowing that he was traveling along a place where there was a loud noise that would impair his power of hearing any bell from a train, or a whistle from a train, it was his duty to be more vigilant and more careful, and to watch closely to protect himself. If you find that within this definition of what the duty of the railroad company was, they discharged that duty; if you find that they blew the whistle in time for this man to get off—not to run to some place that he might choose to get off—but if they rang the bell and blew the whistle, in such time as any reasonable man of good hearing could have heard it, and got off instantly, without deliberation or trying to go farther to select a place to get off, then the defendants are not liable.

If they delayed ringing the bell or sounding the whistle until they were right on him, then that delay would constitute negligence.

If, however, you find that the railroad company's agents were guilty of negligence, there is still a further inquiry before you can find a verdict in behalf of the plaintiff, and that is the amount of care and precaution which he took to avoid this accident. I lay it down to you that he had no legal right to be on that railroad track; the track at that place not being a crossing or any part of a public highway, was private property; that it was built for other purposes; that it was not built to be walked upon by the public, and the fact that persons did walk upon it,

however frequently and however common, does not change the proposition of law. This man had no right to be there, and he should not have been there. It does not follow, however, because he was there unlawfully, that the other party could run him down; but it does follow ^[584] that he being on private property of the company, on a track which is used for a purpose which is dangerous to human life, well known to him, that he being in a place where he ought not to be, that he was bound to use every precaution, every diligence, every care, against the possibility or probability of any danger which might happen to him there.

This was his duty, and it was imperative; and if you find, in the language of one of the counsel for the plaintiff, that he was going along the track with his hands in his pockets, his head down, and his attention abstracted from everything around him, then he was guilty of such negligence as forbids recovery. No man has a right to go upon a railroad track in such a place, and go along in a state of abstraction, careless of what might happen to him; and then turn around and say to the railroad company, however negligent they may have been, you are responsible for my safety. If he is careless himself, it cannot be expected that the railroads can be made to take care of him, and pay for him if he is killed. Being on the track, and walking in a direction where a railroad train might overtake him, reasonable care required of him that he should be vigilant and watchful to discover the approach of any train, and especially from behind; and this vigilance on his part should be increased, from the fact that the noise from the trains and the blasting on the canal, would tend to prevent his hearing the noise made by the approach of a car or train, or its bell, or its whistle. The jury found a verdict for the defendants.

Judgment accordingly.

[585] UNITED STATES v. LOWE ET AL. *

PUBLIC OFFICERS — COMPENSATION — RECEIVER OF PUBLIC MONEY. — A receiver of public moneys is not entitled to offset against the government rejected accounts for unauthorized clerk hire, fuel, lights, or for transmitting money. Office rent may under extraordinary circumstances be allowed.

Before MILLER, J., DILLON, J., and LOVE, J.

IN an opinion prepared by the circuit judge construing various acts of Congress relating to the compensation of officers of the United States, the following propositions were decided.

Mr. Sapp & Mr. Lowe, for the United States.

Polk & Barcroft, for the Defendants.

1. A receiver of public moneys at a local land office is not entitled, when sued on his official bond, to set off against the government a rejected account for unauthorized *clerk hire, fuel, lights*, and for *transmitting money* to the proper government depository.

2. The claim of the receiver for *office rent* may, under circumstances, be allowed as an equitable credit under the Act of March 3, 1797.

[586] UNITED STATES v. NISSLEY.

INTERNAL REVENUE — DISTILLER'S TAX. — Under the Act of July 20, 1868, a distiller must pay tax on eighty per cent of the producing capacity of his distillery.

Before MILLER, J., DILLON, J., and LOVE, J.

PER CURIAM. — Under section 20 of the Internal Revenue Act of July 20, 1868 (15 U. S. Stats. 125), a distiller is bound to pay taxes on eighty per cent of the producing capacity of his distillery, although this be on more than the amount of spirits actually produced.

* In this case and those following, from the district of Iowa, want of space enables us to publish in this volume only the head notes. Such of the opinions as are deemed worth publishing will appear hereafter.

Mr. Sapp, district attorney, and *Mr. Lowe*, assistant district attorney, for the United States.

Mr. Leffingwell, for the Defendant.

IN RE HALL, BANKRTPT.

BANKRUPTCY—APPEAL—REVIEW.—An order vacating an adjudication of bankruptcy made at the former term cannot be revised on appeal.

COMMERCIAL PAPER—SUSPENSION OF PAYMENT—BANKRUPTCY.—A creditor who does not claim under commercial paper may charge as an act of bankruptcy failure by debtor after suspension to resume payment of commercial paper, though suspension be not fraudulent.

DILLON, *Circuit Judge*, delivered the opinion of the court ruling the following points:—

1. An *appeal* to the circuit court does not lie by the petitioning creditor from an order of the district court vacating at the instance of another creditor, an order made at a previous term, adjudicating their debtor a bankrupt; the remedy of the petitioning creditor in such a case is under the second section of the bankrupt act, and not by an appeal under the eighth section. (*Ruddick v. Billings*, 1 Woolw. 330; *Ex parte Alexander*, 8 Am. Law Reg. N. S. 423; *Langley v. Perry*, 8 Am. Law Reg. N. S. 427; *Hawkins v. Bank*, ante, 453.)

2. A creditor whose claim is not evidenced by commercial paper, but rests in an open account, may file a petition [587] against his debtor, under section 39 of the act, and charge as an act of bankruptcy, that he has suspended and failed to resume payment of the commercial paper for the prescribed period.

3. It is not necessary in order to constitute an act of bankruptcy, that the suspension and failure to resume payment of commercial paper for fourteen days should be fraudulent. (*In re Burt*, ante, 439.)

E. A. Storrs, for Petitioning Creditor.

N. M. Hubbard, Opposed.

EX PARTE SCHMEID.

HABEAS CORPUS — ENLISTMENT INTO MILITARY SERVICE. — The validity of an enlistment into the military service of the United States may be inquired into by a United States judge on habeas corpus, and if fraudulently procured, the recruit may be discharged.

ID. — MARRIED MEN. — If a party enlists as a married man, the fact that he has a wife and child does not entitle him to be discharged on habeas corpus.

Before DILLON, C. J., at Chambers.

DILLON, *Circuit Judge.* — I rule the following points:—

1. The validity of the enlistment of a person into the military service of the United States, may be inquired into on habeas corpus by a United States judge.

2. If the enlistment was procured by fraudulent representations on the part of the recruiting officer, and has never been ratified by the party; or if, in consequence of his want of acquaintance with the English language, a foreigner enlists, not knowing that he is actually entering the service, but supposing that he is simply taking the preparatory steps, in either case, he may, on prompt application, be discharged on habeas corpus.

3. If a party, at the time of his enlistment, denies that he is a married man, and enlists as a single man, the fact that he has a wife and child does not entitle him to be discharged [588] on habeas corpus, although it is provided in the army regulations that no married man shall be enlisted without special authority from the adjutant general's office.

Mr. Nash, for the Relator.

Mr. Little, for the United States.

O'BRIEN COUNTY v. BROWN.

JURISDICTION—FRAUDULENT JUDGMENT.—The circuit court has jurisdiction of a bill in equity filed by defendant in a judgment rendered therein, against an assignee of a judgment plaintiff, to set aside the judgment for fraud, though both assignee and plaintiff be citizens of the same State, as such proceeding is merely a continuation of the original suit.

LIMITATION OF ACTION—FRAUD—NOTICE.—Discovery of fraud, in the meaning of the Statute of Limitations, is not to be imputed to a county simply because it was known to its officer who committed it.

Before DILLON, J., and LOVE, J.

DILLON, *Circuit Judge*.—We decide the following points:—

1. The court has *jurisdiction* of a bill in equity, filed by the defendant in a judgment rendered therein, against an assignee of the judgment plaintiff, to set aside the judgment for fraud, though such assignee and the complainant be citizens of the same State; such a proceeding is, in substance, a continuation of the original suit. (*Jones v. Andrews*, 10 Wall. 327; *Dunn v. Clarke*, 8 Peters, 1; *Hospital v. Barclay*, 3 Blatchf. 259; *Dunlap v. Stetson*, 4 Mason, 349.)

2. The bill brought by a county to set aside a judgment, charged to have been fraudulently procured on county warrants fraudulently issued (the assignee of the judgment being charged with complicity in and notice of the frauds alleged), held sufficient on demurrer. (*Clark v. Des Moines*, 19 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *Burtis v. Cook & Sargent*, 16 Iowa, 194.)

3. Discovery of the fraud, within the meaning of the Statute of Limitations, is not to be imputed to the county from the [589] moment the fraud was perpetrated, simply because it was known to the officer who committed it. (*Martin v. Smith*, ante, 85.)

H. B. Wilson, and *T. M. Dye*, for the County.

Joy & Wright, and *Withrow & Wright*, for the Defendant.

PRESTON v. COOPER.

MALICIOUS PROSECUTION—ACTION FOR DAMAGES.—Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond.

ID.—EVIDENCE—PROOF.—To sustain an action at common law for maliciously suing out an attachment, it is not enough to show merely that the writ was wrongfully sued out because there was no debt due. The plaintiff must show malice, want of probable cause, and damage.

PER CURIAM (DILLON, J., and LOVE, J., concurring).—The opinion filed in this case holds:—

1. Where a writ of attachment is sued out maliciously, and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond.

2. The only remedy of the attachment defendant, it *seems*, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was *wrongfully* procured, but there must be allegations of malice and want of probable cause.

3. Where by statute no bond in attachment was required, and none given, the defendant, in the absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out, because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution.

Phillips & Phillips, for the Plaintiff.

N. M. Hubbard, for the Defendant.

APPENDIX.

RULES OF PRACTICE IN THE RESPECTIVE CIRCUIT COURTS OF THE UNITED STATES FOR THE EIGHTH CIRCUIT.

MISSOURI.

Prior to June 29, 1871, the pleadings in the circuit court in actions at law were substantially as at common law, as modified by the statutes of 1845 of that State. The statutes of 1845 were superseded by the code system in the State courts; and on the day first named the circuit court for the Missouri districts "ordered that the forms, proceedings, and practice in civil suits at law, other than in *rem.*, shall, so far as applicable and consistent with other rules of this court, the acts of Congress, and the rules prescribed by the supreme court of the United States, be the same as in the following chapters and sections of title xxxiv., 'Of Practice in Civil Cases,' in the Revised Statutes of Missouri, A. D., 1865, with the exceptions, modifications, and additions herein made." [Here follows an enumeration of the sections adopted.]

Pleadings — The facts which constitute the cause of action or ground of defense, and only such facts, shall be stated in the pleadings; and they shall be stated with certainty, precision, and brevity, logically, and in their natural order, conformably to established rules of pleading; irrespective, however, of those rules which pertain only to technical distinctions as to forms of action.

[NOTE. — Want of space prevents the insertion of the less important rules; but they are in print, and can be had on application to the clerk, at St. Louis.]

ARKANSAS.

[Adopted April Term, 1868.]

I. When a pleading of either party is founded upon a written instrument or account, a copy thereof must be annexed to such pleading, and oyer of the instrument filed, shall not be further craved or granted, without special leave of the court for cause shown.

II. The defendant shall plead on or before the morning of the third day of the term, and the plaintiff shall reply at roll call of the following morning, and the defendant rejoin at roll call of the morning following the filing of the replication, and so on, alternating each day until the issue is made up.

[592] III. When depositions are returned into the clerk's office, they shall be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same, upon payment of the customary fees; but must not allow them to be taken from his office, unless by the mutual written consent of the parties. All objections to depositions received and filed by the clerk in vacation, except objections to the competency and relevancy of the evidence, must be filed on the first day of the term; and objections to depositions received and filed in term time, shall be made on or before the second morning after they are filed, or they will be deemed to be waived.

IV. All demurrers and motions not called up and submitted to the court, before the cause is reached for trial, will be held to be waived.

V. Ordered that the court adopt the act of the legislature of Arkansas, entitled, "An Act to amend chapter 17 of Gould's Digest, under the head of "Attachments in the Circuit Court," approved March 2, 1867, as a part of the practice of this court. [Adopted April Term, 1870.]

[NOTE — The other rules of this court, many of which are obsolete, are printed in Hempstead's Reports.]

NEBRASKA.

[Adopted November 11, 1870.]

I. The clerk shall select seventy-five names, and the marshal an equal number; the names of the persons so selected, being one hundred and fifty in number, shall be placed by the clerk upon ballots, and placed in a box, to be prepared for that purpose. These being thoroughly intermixed, the clerk shall draw therefrom, in the presence of the marshal, who shall keep the count; twenty-three in number to constitute the grand jury of the term.

In the same manner the clerk shall draw from the box twenty-four in number, who shall constitute the petit jury for the term.

Venires for grand and petit juries shall ordinarily be issued by the clerk at least twenty days before the approaching term. But the said rule shall not apply to juries ordered in term; but in such case the juries shall be obtained either by drawing from a box, in the manner provided aforesaid or by directing the marshal to summon the requisite number of qualified persons from the body of the district, to serve as jurors.

In selecting the names of jurors, the clerk or marshal shall not, in the aggregate, select more than sixteen names of persons from any one city or town in the district.

II. Gentlemen admitted to practice in this court shall pay the clerk thereof the sum of three dollars, which fee shall entitle them to receive from said clerk a certificate of their admission to practice.

III. In pursuance to the sixty-seventh rule in equity, general powers are hereby vested in the clerk of this court to name commissioners in all causes to take testimony in suits in like manner that the court, or a judge thereof, [593] now can do by same sixty-seventh rule of the "Rules of Practice for the Courts of Equity of the United States."

IV. In all civil causes, counsel shall be allowed one hour on each side to address the jury, and, without special cause being assigned therefor, no further or longer time shall be allowed for said purpose on either side.

V. In all causes in which costs remain due to the clerk or marshal, or both, in which no executions have been issued, the clerk or marshal, or either of them, be, and they are hereby, authorized and empowered to issue execution in such cause for such costs, and the costs of such proceeding. And that, upon the return of such executions not satisfied, judgment may be entered against the plaintiffs and their securities on the cost bond for the unsatisfied costs; and when, in such case, or cases, executions have been, or may be, issued, and returned unsatisfied, the clerk or marshal, or either of them, shall be authorized to issue further execution for such costs. And when judgment has been, or may be, rendered against the plaintiffs for the costs, and such costs remain unpaid, execution therefor may be issued by the clerk or marshal, or either of them, as herein contemplated.

And it is further ordered, that when the marshal or any other officer of this court, has, or may have, in his possession any writ or other process, or other paper or papers, upon, or in relation to, which he has made a service, or done any service to a party in any suit or proceeding, such officer shall be authorized to retain the possession of such paper or papers until the fees thereon are paid.

VI. It is hereby ordered that the following sections of the Code of Civil Procedure of the State of Nebraska, as the same appear in the volume of the Revised Statutes, published in the year 1866, be adopted to regulate the course of practice of the circuit court of the United States for the district of Nebraska, as far as the same are applicable and consistent with the laws of the United States and the decisions of the supreme court thereof, and with such modifications as will adapt the same to the constitution and practice of the said circuit court—the term sheriff, where the same occurs, being read marshal, the term district being read circuit, the term territory of Nebraska being read United States of America, the term county being read district, etc., etc.

Sections 2 to 28 inclusive.

“ 29 to 50 “
 “ 62 to 76 “
 “ 84 to 249 “
 “ 277 to 327 “
 “ 398 to 419 “
 “ 428 to 450 “

Sections 454 to 485 inclusive.

“ 489 to 531 “
 “ 550 to 560 “
 “ 565 to 579 “
 “ 602 to 642 “
 “ 880 to 888 “

VII. Matters of abatement on account of the character of the parties, shall be alleged by plea in abatement before answer to the merits, and shall be first determined when such order in respect of the prosecution or [594] defense of the cause shall be made by the court, as in each case shall seem just.

VIII. Prerogative writs shall be sued out and prosecuted not according to State statutory provisions, but according to the course of the common law, as modified by modern usage and practice.

IX. Continuances on the ground of the absence of witnesses shall be applied for on the first day of the term, unless the occasion therefor shall afterward arise or come to the knowledge of the applicant, when they shall be at once asked of the court. The motion shall be supported by an affidavit of the party or his attorney, giving the name and residence of the witness whose testimony is required, and the reason for not procuring the same, with a brief statement of facts which it is expected he will testify to. It shall also contain an affidavit of merits, and of the *bona fide* intentions of the party. If the adverse party shall deem the affidavit insufficient, he shall state and file his objections in writing, when, without hearing counsel, the court will determine the application.

The following rules of the United States circuit court for the southern district of New York are hereby adopted:—

Rules 41 to 48 inclusive.

“ 72 to 75 “

Rules 80 to 90 inclusive.

“ 116 to 135 “

X. Causes removed into this court from the courts of the State shall stand for trial at the first term, when the issue has been joined and sufficient opportunity for preparation for trial has been had before the application for removal. Other cases shall stand for trial at the term succeeding that at which the transcript is filed, but demurrers and dilatory pleas shall be filed and determined at the first term.

XI. When in a cause removed from a State court the matter of complaint and of defense is purely legal, no repleader will be necessary in this court.

XII. When in such cause the matter of complaint or defense is purely equitable, the party pleading such matter may, if he choose, file a new bill, in the usual form of bills in equity, and he shall be required by rule entered in the cause so to do, if he has not alleged the same by his petition, in form substantially good as a bill in equity.

XIII. When in such case the matter of complaint or defense is both legal and equitable in its character, a rule to replead, according to the course of this court, shall be entered in the cause.

XIV. When the party applying in the State court for the removal of a cause into this court shall, within the time limited by statute, fail to file his transcript, or a

complete and perfect transcript, the adverse party may present the transcript or the parts of the record omitted in the transcript as filed, and move the court to file the same; and unless some good and sufficient cause be shown against the same, an order will be made for the filing thereof, when the cause shall stand and be proceeded in all its aspects, as if the same had been duly filed by proper party, on the first day of the term.

[595] KANSAS.

[Adopted May Term, 1870, for the Circuit and District Courts.]

I. Defines the seal of the court.

II. In actions at law, the forms of process and mode of procedure, pleading, and practice shall conform, as near as may be, to the regulations relating to process, procedure, pleading, and practice prescribed by the General Statutes of 1868 of the State of Kansas, so far as the same are applicable to actions in the United States courts, and not in conflict with the constitution and laws of the United States. Nothing herein contained shall authorize service of process by any other than the United States marshal, or his deputy, or service by publication, or out of the district, or the joinder of legal and equitable causes of action, as grounds of defense. The provisions of said statute of 1868, as to mode of instructing and charging juries, are not adopted.

III. When a suit is brought by a non-resident, a bond for the costs of suit shall be filed with the clerk; and in case the plaintiff shall not pay any and all costs ordered, adjudged, or decreed against him within ten days after the same are taxed, it shall be lawful for the clerk to issue a fee bill and execution against the security for such costs, and the officers shall proceed upon said execution as in other cases.

IV. The process issuing from this court shall be in the name of "The United State of America."

V. Attorneys and counsellors at law, who have been admitted to practice in the supreme or district courts of this State, or of the territory, on taking the usual oath, may be admitted to practice in this court, on motion.

VI. The clerk shall keep a roll for the signature of attorneys, and issue to each a certificate of admission, under the seal of the court.

VII. All motions made, relating to suits pending in this court, shall be made in writing, and filed with the clerk at or before the time of making the same.

VIII. All matters relating to the jurisdiction of the court, or in abatement, must be pleaded according to the rules of common law.

IX. General power is hereby vested in the clerk of this court to name commissioners to take testimony in chancery causes, in like manner that the court or judge can now do by the sixty-seventh chancery rule.

X. Writs of execution, except their style and proceedings thereunder, shall, as far as practicable, be the same as are now used in the courts of Kansas, and prescribed by the General Statutes of 1868, of the State of Kansas, unless otherwise expressly directed by the judgment ordered; but no notice of the time and place of the appraisement of property levied upon or ordered to be sold shall be required.

XI. When application is made for a continuance for want of an absent witness, if the adverse party will agree that the affidavit may be read as evidence on the trial of the case, subject to all exceptions that could be taken to it, if it were the deposition of the witness or witnesses duly taken [596] and certified, the case shall not, unless for reasons satisfactory to the court, be continued for want of such witness, but the affidavit shall be read on the trial as though it were the deposition of the witness.

XII. Civil causes, upon the second call of the trial docket, will be disposed of for the term, unless good cause is shown to the contrary, or agreement made by counsel at the time of the second call, and where there shall be no attorney to answer to the second call, the cause will be set down to the heel of the docket or dismissed.

XIII. Prescribes how jurors shall be obtained by lot, substantially in the mode set forth in the Nebraska Rules.

XIV. One month before each term of court the clerk shall ascertain what common-law cases are at issue, and shall assign a certain number for trial on Monday, and so for each day down to and including Thursday, and shall notify the attorneys of record by mail of the assignment; and witnesses shall be subpoenaed to attend on the day thus fixed, the necessary expense to be taxed as costs. The time for the trial of appearance causes will be fixed by the court at the beginning of the term. Chancery and appeal cases are to be ready for hearing on call.

MINNESOTA.

[Adopted June 23, 1871.]

The rules from I. to XIV., above printed, of the circuit court for the district of Nebraska, were literally adopted for the Minnesota district, June 23, 1871; also the following:—

XV. In actions at law, the practice and pleadings now existing and prescribed by statute for the district courts of the State of Minnesota be, and the same are hereby, adopted in this court, except so far as the same may be contrary to the constitution and laws of the United States, and except also that all original and final process shall be issued by the clerk of this court under the seal thereof, and be executed by the marshal as heretofore.

XVI. Whenever a pleading is founded upon an instrument in writing, a copy of said instrument shall be annexed to said pleading, and be considered as a part thereof, unless a sufficient reason is stated for the failure so to do by affidavit filed with the pleading.

XVII. Chapter LXXXVI. of the acts of the legislature of the State of Minnesota, approved March 5, 1868, relating to the peremptory challenge of jurors in criminal cases, is adopted as a rule of practice in criminal cases in the circuit and district courts of the United States for the district of Minnesota.

XVIII. In all cases of redemption of real property from sale upon execution, or decree of this court, the money paid for such redemption may be paid to the person holding the right acquired under the sale, or, at the option of the person redeeming, it may be paid into this court, and the clerk of this court shall, in such case, make, acknowledge, and deliver to the person redeeming, a certificate, under his hand and the seal of this [597] court, in the same form substantially, and with the like effect, as the certificate authorized by the laws of the State in case of a redemption from the sheriff or clerk of the district court, in case of redemption under the State laws; and for receiving into court, and paying over the money paid on such redemption, and executing the certificate, the clerk shall be entitled to receive from the party redeeming the sum of five dollars, and when the redemption money exceeds the sum of two thousand dollars, the sum of ten dollars, in addition to the expense of acknowledging the certificate, and the sum so paid the clerk by the party redeeming shall become part of his lien upon the property redeemed.

IOWA.

[Adopted at the May Term, 1863.]

It is hereby ordered that the following chapters and sections of the Revised Code of the State of Iowa (Revision of 1860), be adopted to regulate the practice of the circuit court of the United States for the district of Iowa, as far as the same are applicable and consistent with the laws of the United States and the decisions of the supreme court of the United States, and with such modifications as will adapt them to the constitution and practice of said court; provided that nothing in this order shall be held to abrogate the rule heretofore adopted to regulate the selecting and

summoning of grand and petit jurors; and, provided further, that in all cases where the aforesaid chapters and sections furnish no rule of practice, the rules, usages, and practice of the United States district court of Iowa, while exercising circuit court jurisdiction, shall be followed, until otherwise ordered by the court; viz:—

OF CHAPTER CXVII. — *Of Parties to Action.* — Sections 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2781, 2782, 2783, 2784, 2786, 2787, 2788, 2790, 2791, 2792, 2794; sections 2815, 2816, 2817, 2819, 2820, 2821, 2822, 2824, 2825, 2826 (except the words “or a partnership”), 2827, 2828, 2829, 2830, 2840, 2841. In all these sections the word “notice” is to be construed to mean “writ of summons.”

CHAPTER CXXI. — *Of Joinder of Action.* — The whole of chapter CXXI., as far as applicable, etc.

OF CHAPTER CXXII. — *Of the Time of Pleading.* — Sections 2849, 2861 (to the word “direct,” in the fourth line), 2864, 2869, 2870, 2871, 2872 (to the word “abolished,” in the second line), 2874, 2875, substituting the word “district” for “county,” in the first subdivision; striking out all the second subdivision after the word “petition,” in the second line; omitting the whole of the sixth subdivision (printed ninth); section 2877, in the word “pleading,” in the third line; sections 2879, 2880, substituting the word “district” for “county,” and striking out the words “whether legal or equitable,” in the sixth subdivision; sections 2882, 2883, 2884, 2886, 2887, 2888, 2889, 2890, 2891, 2893, 2894, 2895, 2896, 2897, 2898 (to the word [598] “apply,” in the fourth line), 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2928, 2929, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967 (as amended), 2968, 2970, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, and from 2985 to 2992 inclusive.

OF CHAPTER CXXIII. — *Of the Trial and its Incidents.* — From section 2993 to 2999 inclusive;

From 3007 to 3026 inclusive, except section 3017;

From 3026 to 3044 inclusive;

From 3046 to 3052 inclusive;

From 3056 to 3057, except these words in section 3057, “which charge shall be exclusively in writing”;

From 3061 to 3085 inclusive, except as follows: in section 3062 the words in the third line, “without food and without drink”; in section 3072, in the first line, the words “shall be in writing”; in section 3076, the words following the word “lodging,” to the end of the section;

From 3086 to 3088 inclusive, except the words in section 3088 following the word “defendant,” in the third line, to the end of the section;

From 3089 to 3105 inclusive;

From 3106 to 3110, except all below the eleventh line of section 3110 following the word “party”;

From 3112 to 3120 inclusive;

From 3125 to 3147 inclusive;

And from 3148 to 3155 inclusive, except 3153 and 3153.

CHAPTER CXXIV. — *On Attachment and Garnishment.* — So far as the same is a mere auxillary proceeding, and consistent with the laws of Congress and the jurisdiction and practice of the United States courts.

CHAPTER CXXV. — *On Executions.* — So far as applicable and consistent with the laws of Congress.

CHAPTER CXXVI. — *On Proceedings Supplemental to the Executions.* — Subject to the same limitation.

CHAPTER CXXXV. — *On Motions and Orders.* — With the same qualification.

CHAPTER CXXXVIII. — *On Survivor and Revivor of Actions.* — With the same qualification.

CHAPTER CXXXIX. — *On Revivor of Judgments.* — With the same qualifications.

CHAPTER CXLII. — *On Replevin.* — With the same qualification.

CHAPTER CXLIII. — *On Detinue.* — With the same qualification.

CHAPTER CXLIV. — *On Action for the Recovery of Real Property.* — With the same qualification.

[599] OF CHAPTER CL. — *On Habeas Corpus.* — The following sections: 3801, 3802, 3806, 3807, 3808, 3809, 3811, 3812, substituting the word "marshal" for "sheriff," and this is to apply to every other section hereby adopted; sections 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843.

CHAPTER CLIX. — *On Evidence.*

ADDITIONAL RULES.

I. Every application for leave to amend pleading must be accompanied by the amendment proposed to be filed.

Rules Respecting the Order of Business Adopted May Term, 1871.

. Hereafter the clerk of the court is directed to docket separately all actions upon county and city bonds, and mandamus, and other special proceedings arising out of such actions. And the first two days of the term, or so much thereof as may be necessary, will be devoted to the disposition of such cases and proceedings.

Unless the assignment of cases for the succeeding term shall have been made by the court when in session, the clerk shall, at least one month before the term, make an assignment of all cases at issue on the law docket for specific days of the next following term, commencing on the first Thursday thereof; and shall cause such assignment to be published, and mail a copy to the respective attorneys of record, taxing the necessary actual expense and postage as costs in the case. Subpoenas for witnesses shall require them to appear on the day on which the cause is set for trial.

Causes thus assigned shall be tried on the days fixed therefor, unless, by consent in writing, a jury be waived, in which case they will be placed at the foot of the jury list, and at the head of the list of law cases for trial by the court.

Chancery cases and causes on the appeal calendar shall be at all times ready for disposition on call.

The third week of every term, or so much thereof as may be necessary, will be set apart for the trial of government causes, civil and criminal. The court may, however, require cases of difficulty or importance to be tried or disposed of at an earlier period of the term.

Order Concerning Appointment of Commissioner to take Testimony.

III. In pursuance of an amendment of the sixty-seventh rule governing equity practice in this court, it is ordered by the court that the clerk of this court be and is hereby invested with full power to name commissioners to take testimony, in like manner, and to the same effect as this court or the judges of this court can now do by said sixty-seventh rule, and the several amendments thereto.

[NOTE. — Geo. B. Corkhill, Esq., clerk of the circuit court, has included the foregoing rules, together with the rules of the district court, and the equity and admiralty rules, and the general orders in bankruptcy prescribed by the supreme court of the United States, in a volume recently published by Mills & Co., at Des Moines.]

INDEX.

ABATEMENT. See CRIMINAL LAW.

1. PLEAS IN CRIMINAL CASES. — Pleas in abatement to an indictment are dilatory pleas; and not being favored, the law requires that they shall be pleaded with strict exactness. — *United States v. Williams*, 485.
2. ID — As to pleas in abatement founded upon *disqualification* of grand jurors. — *Id.*
3. ID. — A plea in abatement construed to mean that the indictment should not be for the prosecuted, because an interested person caused himself and others to be placed upon the grand jury which found the bill. — *Id.*
4. Whether such a plea is good, *quere?* Authorities cited. — *Id.*
5. IN ACTION ON FIRE POLICY. — See INSURANCE. — *Weide v. Insurance Company*, 441.
6. PLEAS IN ABATEMENT IN CIVIL ACTION. — See RULES OF COURT, in APPENDIX.

ACKNOWLEDGMENT. See MINNESOTA STATUTES.

1. NOT CONCLUSIVE. — The facts stated by the officer in the certificate of acknowledgment of a deed or mortgage is not *conclusive* under the statute of Minnesota. — *Drury v. Foster*, 460.
2. MARRIED WOMEN — ACKNOWLEDGMENT — FILLING BLANKS. — In Minnesota due acknowledgment is necessary to bar dower, or enable a married woman to convey her real estate, and a deed void when acknowledged by reason of containing blanks cannot be ratified except by a reacknowledgment of the instrument. — *Id.*

ACTION. See VARIOUS HEADS.

1. AGAINST CITY FOR DEFECTIVE STREETS. — Liability of city corporation for accidents caused by defective streets. — *Serrot v. Omaha*, 312.
2. ID. — NOTICE. — Notice by city corporation of defect, how far essential to liabilities therefor. — *Id. note.*
3. ID. — DECLARATION. — Allegations in declaration against a city for damages caused by a defective and dangerous street, held sufficient, without a distinct averment of notice by the city of its condition. — *Id.*
4. ID. — DANGEROUS CONDITION OF STREET. — Author of a dangerous nuisance on a public street liable to a private action by a person injured. — *Ware v. Water Co.* 465.
5. ID. — And in such cases the liability exists although the work be done by a contractor, who is not an improper person. — *Id.*
6. EFFECT OF RECOVERY AGAINST CITY. — Effect of judgment against city corporation in concluding the author of the nuisance in an action by the city for indemnity. — *Id. note.*

ADMINISTRATOR. See EXECUTOR.

ADMIRALTY.

1. TORT — COLLISION BETWEEN STEAMERS. — In a case of collision between an ascending and descending steamer on the Ohio River, both were held to be in fault, and the damage divided. — *Hazlett v. Conrad*, 79.

ADMIRALTY (Continued).

2. **SIGNAL LIGHTS—LOOKOUTS.**—The respondent's vessel was adjudged to be in fault because out of her proper place in the river when the collision occurred, and because she had no licensed pilot and no proper lookout; and the libelants' vessel was found to be in fault because her signal lights were not in proper places, and because she had no lookout as required by law, and her master was not at his post, but away from it without cause.—*Id.*
3. The *testimony* relating to the foregoing facts stated and effect considered by KREKEL, J.—*Id.*
4. **SIGNAL LIGHTS.**—Signal lights hung on each side of the boat on nails driven into the nosing of the hurricane roof are not in their proper places.—*Id.*
5. **LOOKOUTS.**—The pilot house in the night time, especially when it is very dark, and the view obstructed, is not the proper place for the lookouts to be stationed.—*Id.*
6. **Masters of vessels** are not proper lookouts.—*Id.*
7. **DUTY OF MASTER.**—A commander of a steamer who, after hearing the whistle of an approaching vessel, goes below on deck to look after freight without any justifying reason, held to be in fault where a collision occurs before his return to his post.—*Id.*
8. **MARITIME CONTRACTS.**—A contract by which a steamboat navigating the public inland waters of the United States engages in consideration of freights to be earned, to carry certain goods and collect from consignee the freight money, charges, advances, and insurance, together with the price of the goods, and after deducting the freight money to pay the balance to the consignor, is a maritime contract, within the jurisdiction of the district court, in admiralty, and is a contract within the scope of the master's authority, and binding on the owners of the vessel in favor of a shipper, who had no knowledge that the boat was already chartered for the use of others.—*The Hardy*, 460.

AFFIDAVIT.

When required in application to remove causes from the State to the federal court.
—*Sweeney v. Coffin*, 73; *Sands v. Smith*, 290 and note.

AGENT. See INSURANCE.

1. Knowledge of agent acquired in *other* transactions, when notice to his principal.—*Geib v. Insurance Company*, 443 and note.
2. Powers of local insurance agents. See INSURANCE.
3. Compensation of life insurance agent as affected by usage.—*Patridge v. Insurance Company*, 189.

AGREEMENT. See CONTRACT, and VARIOUS HEADS.

ALIEN.

Resident alien as affected by regular discharge under State insolvent law.—*Von Glahn v. Varrenne*, 515.

APPEAL. See BANKRUPT LAW.

1. From the district to circuit court in bankruptcy cases, how taken.—*Hawkins v. Bank*, 453.
2. Construction of section 2 and section 8 as to review and appeal in bankruptcy cases.—*Id.*; *Markson v. Heaney*, 497, note; *In re Hall*, 586.
3. Effect of appeal to the supreme court, and supersedeas bond.—*Schenck v. Peay*, 269.

ARKANSAS.

1. Constitutional provision abolishing slavery and declaring executory slave contracts void is valid, and does not conflict with the national constitution. — *Osborn v. Nicholson*, 219.
2. Municipal railway aid bonds. — *Gilchrist v. Little Rock*, 261.
3. Rules of Court. See APPENDIX.

ARMY CONTRACTOR.

1. ARREST. — Liable to military arrest for frauds against the government under army contracts. — *Holmes v. Sheridan*, 351.
2. TRIAL. — If arrested, entitled to speedy trial. — *Id.*

ARMY COMMANDER. See CONSTITUTIONAL LAW; MILITARY OFFICER.

Authority of in time of war, and liability for trespasses to persons and property. — *Holmes v. Sheridan*, 351; *Clark v. Dick*, 8.

ARMY ENLISTMENT.

1. Validity of enlistment into the army may be inquired into on habeas corpus by a federal judge. — *Schmeid's Case*, 587.
2. Fraud in recruiting officer may be ground of discharge on habeas corpus. — *Id.*
3. Enlistment of a married man. — *Id.*

ASSAULT.

Upon officer of the United States. — *Smith's Case*, 212.

ASSIGNEE. See BANKRUPTCY.

ASSISTANCE, WRIT OF.

The power to issue extends only to the parties to the suit, and those coming in under them after suit commenced. — *Thompson v. Smith*, 458.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Such an assignment, although free from fraud, is an act of bankruptcy. — *Hobson v. Markson*, 421; *In re Burt*, 439.
2. ASSUMPSIT — PLEA OF PLENE ADMINISTRAVIT. — Where the statute classifies the debts against an estate, directs the order of payment, and only makes an administrator liable to the extent of assets received, the common-law plea of *plene administravit* is no defense, and is not proper in an action against the executor merely seeking to establish the existence of the plaintiff's debt against the estate. — *Covington v. Burnes*, 16.

ATTACHMENT OF PROPERTY.

1. In a cause removed from the State court, the circuit court may hear a motion to discharge the attached property when such a motion is authorized by the State law. — *Garden City Co. v. Smith*, 305.
2. Attachment for contempt. See WITNESS.
3. Remedy of attachment defendant where the writ is *wrongfully* sued out. — *Preston v. Cooper*, 589.
4. Remedy where *maliciously* sued out, without probable cause. — *Id.*

ATTORNEY. See AGENT.

Fees for services rendered to bankrupt. — *Triplett v. Hanley*, 217.

BAIL BOND. See CRIMINAL LAW.

BANKS.

CHARTER — INTEREST. — Effect on the contract, of taking by a banking corporation a greater than charter rate of interest—how far it invalidates it.—*Darby v. Boatm. Sav. Inst.*, 141.

BANKRUPT LAW See INSOLVENT LAWS.

1. **APPEALS IN BANKRUPTCY.** — In equity cases to circuit court regulated by section 8 of act and general order 26 of the supreme court. — *Hawkins v. Bank*, 453..
2. **APPEALS, HOW TAKEN.** — Must be claimed and notice given. — *Id.*
3. **APPEALS — PRACTICE.** — If not duly taken, will be dismissed. — *Id.*
4. **ID.** — Construction of sections 2 and 8 of bankrupt act, as to appeals and review. — *Id.*; *Markson v. Heaney*, 497; *In re Hall*, 586.
5. **PETITION FOR REVIEW.** — Power of circuit court judges in vacation. — *Markson v. Heaney*, 511, note.
6. **JURISDICTION OF FEDERAL AND STATE COURT — INJUNCTION.** — A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States district court for Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced suit to foreclose in one of the State courts of Indiana without permission of the bankrupt court, making the assignees defendants. The mortgagee was a resident and a citizen of Minnesota. The assignees in bankruptcy filed a bill in the circuit court of the United States for the district of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the bankrupt law, and asking a decree to have it declared void, and for an injunction to restrain the defendant from further prosecuting his foreclosure suit in Indiana. *Held*, 1. That the district court in which the bankruptcy proceedings are pending, or the circuit court for *that district*, can, in cases where the suit in the State court is commenced *after* the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same. *Held*, 2. That in this case the circuit court for the Minnesota district had no bankruptcy jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused.— *Id.*
7. **ID. — MORTGAGED PROPERTY.** — Power of the bankrupt court in such a case to order the sale of the mortgaged estate, and to give notice to the non-resident mortgagee, considered.— *Id.* note.
8. **ORDER OF ADJUDICATION — VALIDITY.** — An order of the district court, adjudicating a debtor a bankrupt, made after the return day, but upon a petition of a creditor, and after notice to, and appearance by, the debtor, though it may be irregular, is not void, and cannot be collaterally assailed. — *Hobson v. Markson*, 421.
9. **TRADER, WHO.** — A person engaged in manufacturing and selling lumber as merchandise is a trader. — *In re Cowles*, 440, note.
10. **INSOLVENCY DEFINED.** — Meaning of "insolvency," as used in the present bankrupt law, defined, and the Massachusetts definition adopted, by CALDWELL, J. — *Rison v. Knapp*, 186; *Martin v. Tbof*, 203.
11. **KNOWLEDGE OF INSOLVENCY.** — Knowledge of facts which in law constitute insolvency, is knowledge of insolvency itself. — *Martin v. Tbof*, 203.
12. **ATTORNEY'S FEES FOR SERVICES BEFORE BANKRUPTCY.** — The assignee in bankruptcy cannot recover from an attorney the amount of a fee fairly paid to him by an insolvent person for necessary services rendered at the time, there being no fraud in fact or upon the bankrupt act. — *Triplett v. Hanley*, 217.
13. **ID. — FOR RESISTING PETITION OF CREDITORS.** — Payments made to an attorney by the bankrupt in contemplation of bankruptcy, for services in opposing the petition of creditors under the thirty-ninth section, will be allowed to stand only

BANKRUPT LAW (Continued).

- so far as consistent with a due regard for the interests of the general creditors. — *Id.*
14. **SECTION 35—SALE OUT OF USUAL COURSE** — Under the thirty-fifth section of the bankrupt act it was held erroneous to instruct the jury "that if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent." The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was *prima facie* evidence that it was fraudulent — *Babbitt v. Walbrun & Co.*, 19.
 15. **Id.** — A sale of property by the bankrupt out of the usual and ordinary course of business is presumptively fraudulent, but this presumption may be rebutted by evidence *aliunde*, to be produced by the vendee. — *Id.*; *Martin v. Toof*, 203.
 16. **MORTGAGE TO SECURE PRE-EXISTING DEBT.** — A mortgage by an insolvent of all his property to one creditor to secure pre-existing debt, adjudged void. — *Rison v. Knapp*, 186.
 17. **SECTION 35.—INGREDIENTS OF RIGHT OF ACTION.** — Construction of the 35th section of the bankrupt act; and the ingredients of a right of the assignee to recover thereunder, stated and commented on. — *Andrews v. Graves*, 108; *Giddings v. Dodd, Brown & Co.* 115; *Darby v. Boatm. Sav. Inst.* 141; *Darby v. Lucas*, 164; *Rison v. Knapp*, 186; *Martin v. Toof*, 203.
 18. **EVIDENCE — VARIANCE.** — Under a declaration upon section 35 of the bankrupt act, alleging that the bankrupt did "transfer, assign, and convey," etc., to the defendant, the plaintiff is not limited on the trial to the proof of a technical assignment under the State insolvent laws. — *Andrews v. Graves*, 108.
 19. **ILLEGAL — PREFERENCES — INTENT.** — Creditors who receive an illegal preference are liable to the assignee of the bankrupt; and the intent of the debtor to give, and of the creditor to secure, an unauthorized preference, may be shown by circumstances. — *Giddings v. Dodd, Brown & Co.* 115; *Linkman v. Wilcox*, 161; *Rison v. Knapp*, 186; *Martin v. Toof et al.* 203; *Vanderhoof's Assignee v. City Bank*, 476.
 20. **PROOF OF ILLEGAL PREFERENCE.** — Facts establishing an illegal preference stated. — *Giddings v. Dodd, Brown & Co.* 115; *Linkman v. Wilcox*, 161; *Wright v. Filley*, 171; *Rison v. Knapp*, 186; *Martin v. Toof et al.* 203; *Vanderhoof's Assignee v. City Bank*, 476; *In re Richter*, 544.
 21. **FRAUDULENT PREFERENCE — EFFECT OF JUDGMENT — SURRENDER.** — Where an assignee brings his action under the thirty-fifth section, to recover of a creditor of the bankrupt property alleged to have been sold to him in fraud of the act, and the defendant in such action denies his liability, resists a recovery, goes to trial, and judgment passes against him, such a judgment conclusively establishes that the creditor sought to obtain a fraudulent preference, and disentitles him to prove up against the estate of the bankrupt the debt or claim on account of which he received the fraudulent preference. Payment of such a judgment upon execution issued is not such a *surrender* as is contemplated by section 23, and will not entitle the party to prove up the claim in satisfaction of which he received property from the bankrupt by way of illegal preference. — *Richter, In re*, 544.
 22. **EFFECT OF ILLEGAL PREFERENCE.** — Where the debt on account of which the illegal preference is received is single and entire, the creditor is entitled to no dividends thereon, though it may have been proved up or allowed before the judgment was obtained which established the fraudulent character of preference; but if he has two disconnected debts, receiving a fraudulent preference as to one only, will not effect his right to prove up the other or to receive dividends thereon. — *Id.*
 23. **Id.** — An open running account for merchandise sold, consisting of various items of charges and credits at different times, on which was credited the

BANKRUPT LAW (Continued).

- amount at which property was purchased by way of fraudulent preference, leaving a balance which was proved up before the register against the bankrupt's estate, was held *prima facie* to be but a single debt or claim, and, by reason of such preference, disentitled to any dividend on any part thereof. — *Id.*
24. **ILLEGAL PREFERENCE — EFFECT.** — Sections 28 and 39 of the bankrupt act commented on, and construed to stand together. — *Id.*
 25. **PURCHASES OF PROPERTY FROM INSOLVENTS.** — An embarrassed person may make a fair and honest sale of his property for value. — *Darby's Trustees v. Lucas*, 164.
 26. **LOANS TO INSOLVENTS — WHEN VALID — SECURITIES THEREFOR.** — The bankrupt act does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such loan, provided it be made *bona fide*, and without any intent, or participation in any intent, to defraud creditors or defeat the bankrupt act. — *Darby v. Boatm. Sav. Inst.* 141; *Gaffney's Assignee v. Signaigo*, 158; *Hawkins v. Hastings Bank*, 462.
 27. **Id.** — Advances made in good faith to an indebted person, to enable him to carry on his business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act. — *Hawkins v. Hastings Bank*, 462.
 28. **FORM OF SECURITY — ABSOLUTE DEED.** — Security may be taken by absolute deed. — *Gaffney's Assignee v. Signaigo*, 158.
 29. **USURIOUS LOANS — ADVANCES AT ILLEGAL RATES.** — Where the charter of a bank prohibited it from taking greater than a specified rate of interest, but was silent as to the effect or penalty if more than the charter rate be taken, it was held that if an illegal rate be contracted for, the effect was not to render the whole note void, but only the excess beyond the legal rate, and that, at all events, if such a note be voluntarily paid, neither the borrower nor his assignee in bankruptcy can recover back the principal sum, or anything more than the excess beyond the legal rate of interest. — *Darby v. Boatm. Sav. Inst.* 141.
 30. **REMEDY — IN WHAT COURT.** — Equity will entertain a bill to recover such excess; the remedy is not exclusively at law. — *Id.*
Same principle. — *Bean v. Brookmire et al.* 151.
 31. **SECTION 39 — SUFFERING PROPERTY TO BE TAKEN ON LEGAL PROCESS.** — Construction of this clause of section 39. — *Wright v. Filley*, 171; *Vanderhoof's Assignee v. City Bank*, 476.
 32. **INSANE INSOLVENT.** — A person who is so unsound in mind as to be wholly incapable of managing his affairs, cannot commit an act for which he can be forced into bankruptcy by his creditors. — *In re Marvin*, 178.
 33. **ASSIGNMENT UNDER STATE LAWS.** — An act of bankruptcy. — *Hobson v. Markson*, 421; *In re Burt*, 439.
 34. **Id.** — **RIGHT OF POSSESSION.** — Assignee in bankruptcy as against assignee under State law entitled to the estate of the debtor. — *Hobson v. Markson*, 421.
 35. **ACTS OF BANKRUPTCY — COMMERCIAL PAPER.** — The stoppage of payment of commercial paper for fourteen days is an act of bankruptcy, although there be no positive fraud. — *In re Burt*, 439 and note; *In re Hall*, 586.
 36. **Id.** — **WHO MAY FILE PETITION.** — A creditor by open account may charge as an act of bankruptcy the suspension and failure to resume payment of commercial paper. — *In re Hall*, 586.
 37. **FRAUD — COMPOSITION AGREEMENT — RIGHT OF ACTION.** — The assignee in bankruptcy may recover money fraudulently paid by the bankrupt to the defendants in order to obtain their signature to a composition agreement. — *Bean v. Brookmire et al.*, 151.
 38. There is no remedy in equity in such case. — *Id.*

BANKRUPT LAW (Continued).

39. **COMPOSITION AGREEMENT CONSTRUED — EFFECT.** — A provision in a composition agreement that "it is not to be binding on any one unless agreed to and signed by *all* of the creditors," applies to secured as well as unsecured creditors; and where this provision is not waived and the composition agreement is not signed by all, it does not have the effect to relieve the debtor from a state of *insolvency* within the meaning of the bankrupt act. — *Kinsing's Assignee v. Bartholow*, 155.
40. **Effect of extension of time to a debtor on his *insolvency*** discussed by CALDWELL, J. — *Rison v. Knapp*, 186.
41. **BANKRUPTCY — SALES OUT OF ORDINARY COURSE.** — Under the thirty-fifth section of the bankrupt act it was held erroneous to instruct the jury "that if a sale of property by the bankrupt was not in the ordinary and usual course of business, it was fraudulent." The instruction should have been, not that such a sale was absolutely fraudulent, but that the fact referred to was *prima facie* evidence that it was fraudulent. — *Babbitt v. Walbrun & Co.*, 19.
42. **ID. — PROOF OF FRAUD.** — A sale of property by the bankrupt out of the usual and ordinary course of business is presumptively fraudulent, but this presumption may be rebutted by evidence *abundant*, to be produced by the vendee. — *Id.*
43. **ID. —** When it is sought to affect a second vendee with fraud, such fraud must be shown, and the *mere fact*, with more, that he knew that the sale by the bankrupt to the first vendee embraced all of the stock of the seller, will not make the purchase of the second vendee fraudulent in law. — *Id.*
44. **ID. —** Certain sections of the bankrupt act, relating to fraud, commented on by the circuit judge. — *Id.*
45. **PURPOSE AND POLICY** of the bankrupt act stated by MR. JUSTICE MILLER. — *Bean v. Brookmire*, 24. By the circuit judge. — *Giddings v. Dodd*, 115; *Darby's Trustees v. Boatm. Sav. Inst.* 141; *Linkman v. Wilcox*, 161; *Darby's Trustees v. Lucas*, 164; *Rison v. Knapp*, 186; *Markson v. Heaney*, 497.
46. **ACTION AGAINST SUBSEQUENT VENDEE.** — When it is sought to effect a *second vendee* with fraud, such fraud must be shown, and the *mere fact*, without more, that he knew that the sale by the bankrupt to the first vendee embraced all of the stock of the seller, will not make the purchase of the second vendee fraudulent in law. — *Babbitt v. Walbrun & Co.*, 19.
47. **ID. —** What facts will put a *second vendee* upon inquiry as to the *bona fide* of the sale by the bankrupt to his own vendor. — *Rison v. Knapp*, 186.
48. **BONA FIDE PURCHASER, WHO.** — What constitutes a *bona fide* purchaser, viz., absence of notice and payment of consideration. — *Id.*
49. **SECTION 35. — THE FIRST AND SECOND CLAUSES CONSTRUED.** — The two clauses of the thirty-fifth section of the bankrupt act apply to transfers to *two* different classes of persons dealing with the bankrupt. The first clause applies to a creditor or a person having a claim against the bankrupt, or who is under a liability for him and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him. — *Bean v. Brookmire*, 24; *Darby's Trustee v. Lucas*, 164.
50. **What will avoid a conveyance under the clause 2, of section 35.** — *Darby's Trustees v. Lucas*, 164.
51. **LIMITATION CLAUSES.** — The four and six months limitations in section 35 of the bankrupt act considered; and it is held that where the transaction by the insolvent is with a creditor, the four months limitation applies, but where the transaction is with a general purchaser, the six months limitation governs. — *Bean v. Brookmire*, 24.
52. **ID. —** Accordingly, where in an action by the assignee under section 35 the declaration alleged a payment by the bankrupt to the defendants, in liquidation of an existing debt, and to have been made to them as creditors of the bankrupt,

BANKRUPT LAW (Continued).

- with intent to give a preference; and alleging that this was done within six months, but not within four months of the filing of the petition under which the bankruptcy was established, it was held to be demurrable. — *Id.*
53. All illegal and fraudulent transactions which are so by the common law, by the statute law, or by the rules of law, other than the special limitations in section 35 of the bankrupt act, are governed by the limitation of two years upon the assignee in bringing the suit. (*Arguendo per MR. JUSTICE MILLER.*) — *Id.*
54. STATE LIMITATION STATUTE CONSTRUED. — The five years State statute of limitation providing that actions for relief, on the ground of fraud, must be brought within five years after the discovery of the facts constituting the fraud, construed, and held, in an action by the assignee in bankruptcy of a fraudulent debtor, not to apply to a case of fraud continuing down to the commencement of the suit, even though the initial fraudulent transaction took place more than five years before suit brought. — *Martin v. Smith*, 85.
- See LIMITATION OF ACTIONS.
55. RIGHTS OF INDIVIDUAL AND FIRM CREDITORS. — Where a partnership has been dissolved, and one of the co-partners purchases all of the assets of the firm, and agrees to pay all of the debts, and both parties subsequently become bankrupt, and are individually put into bankruptcy so that there is no solvent partner and no firm property: Held, that the creditors of the firm, as well as the individual creditors of the partner who assumed to pay the firm debts, were entitled to share *pari passu* in the estate of such partner. — *In re Downing*, 83.
56. Under the bankrupt act (§ 36), assets are to be marshalled between the firm creditors and the separate creditors of the partners only when they are firm and separate assets, and proceedings are instituted against the firm and the individual members, as provided in that section. — *Id.*
57. *Id.* — The assignee of the firm may bring a bill to recover real property purchased by one of the partners in his own name with firm means, and conveyed in fraud of the bankrupt act. — *Patrick v. Central Bank*, 303.
58. FRAUDULENT CONVEYANCES — LOCAL STATUTE. — When a sale or conveyance by the bankrupt before bankruptcy is void as to creditors, under the local statute of the State where he resides, and the sale or conveyance is made, the assignee of the bankrupt may impeach the same and bring suit for, or in respect to, the property sold or conveyed. — *Allen v. Massey*, 40.
59. *Id.* — LOCAL STATUTE. — The statute of the State of Missouri as to fraudulent conveyances, construed and applied. — *Id.*
60. Limitation of action in such cases. — *Martin v. Smith*, 85.
61. FORM OF SECURITY. — A security otherwise valid may be by an absolute deed instead of a mortgage. — *Gaffney's Assignee v. Signaigo*, 158.
62. BANKRUPT LAW UNIFORM AND CONSTITUTIONAL — EXEMPTION. — That part of the bankrupt act which adopts the State exemption laws in force in 1864 as the measure of property to be exempted under proceedings in bankruptcy, is uniform in its operation among the States, and is therefore constitutional. — *In re Beckerford*, 45.
63. EXEMPTION ON HOMESTEAD. — By the exemption laws of Missouri in force in 1864, a homestead may be set apart to a debtor out of a leasehold in real estate, or where such leasehold is not susceptible of division he may retain one thousand dollars out of the proceeds of it. — *Id.*
64. WITNESS — WIFE. — Wife when and when not a competent witness for or against her husband in bankruptcy proceedings. — *Tenney v. Collins*, 66, note.

BILLS AND NOTES.

1. NOTICE TO INDORSER — HOW GIVEN — POSTOFFICE. — If indorser is notified through postoffice of the place where he lives and where the note was dishonored, it binds him, if actually received in time. — *Spalding v. Krutz*, 414.

BILLS AND NOTES (Continued).

2. *Id.*—If indorser lives outside of the city limits where the note is dishonored, but has a known business place in the city, notice should be given there; but if given through the postoffice, and received in time at his place of business, he is bound. — *Id.*
3. *Id.*—NOTARY SIGNATURE.—Notary's signature to notice of protest may be in print. — *Id.*

BONDS.

1. Bonds issued by municipalities in aid of railways. See MUNICIPAL CORPORATION.
2. Bonds to secure appearance of principal cognizor to answer a criminal charge. See CRIMINAL LAW.
3. SUPERSEDEAS BOND.—*Schenck v. Peay*, 269.

BUILDING CONTRACTS.

Contracts to build railways will not, ordinarily, be specifically enforced.—*Failen v. Railroad Co.* 121.

CARRIER. See RAILROAD.

CHANCERY. See EQUITY, and VARIOUS HEADS.

CHARGE OF COURT. See PRACTICE.

CHARTER. See BANK.

Of municipal corporations judicially noticed.—*Fauntleroy v. Hannibal*, 118, note.

CHATTEL MORTGAGE. See BANKRUPT LAW; MINNESOTA STATUTES.

CHEROKEE INDIANS. See INDIANS.

CIRCUIT COURT. See BANKRUPT LAW; JURISDICTION.

1. CIRCUIT JUDGE.—Purpose of Congress in the act of April 10, 1869, creating the office and providing for the appointment of circuit judge, stated.—*In re Circuit Court*, 1.
2. SUPREME JUSTICE—PRACTICE ON CIRCUIT.—The supreme justice sitting in the circuit court will not review decisions made by the district judge when the latter alone held the court, not even with his consent.—*Appleton v. Smith*, 202.
3. CIRCUIT COURTS—SCHEME OF ORGANIZATION—DISTRICTS OF MISSOURI.—The organization of the circuit courts of the districts of Missouri is peculiar, and is provided for by the Act of March 8, 1857 (11 U. S. Stats. 197).—*In re Circuit Court*, 1.
4. *Id.*—By this act it was provided that Missouri should be divided into two districts with but one circuit court for both, and that the two judges of the district court should sit in the circuit court. Held, that the Act of April 10, 1869 (16 U. S. Stats. 44), creating the office and providing for the appointment of circuit judges, and declaring who should hold the circuit courts, did not exclude either of the district judges from the right still to sit in the circuit court.—*Id.*
5. *Id.*—The scheme of the organization of the national courts by the judiciary act and the purpose of Congress in creating the new circuit judgeships, commented on by the circuit judge.—*Id.*
6. INDIANS—JURISDICTION.—Criminal jurisdiction over offenses committed by Indians within State limits.—*United States v. Yellow Sun*, 271.
7. *Id.*—Civil jurisdiction over Indians.—*Karrahoo v. Adams*, 344; *Ex parte Forbes*, 363.

CIRCUIT COURT (Continued).

8. **BANKRUPTCY.** — Jurisdiction in bankruptcy of the circuit court. See **BANKRUPT LAW**
9. **CAUSES REMOVED FROM STATE COURT.** — Jurisdiction of circuit court over
See **REMOVAL OF CAUSES**

CITY. See **MUNICIPAL CORPORATION.**

CITIZENSHIP. See **INDIANS; JURISDICTION; REMOVAL OF CAUSES.**

CIVIL WAR. See **LIMITATION OF ACTIONS; REBELLION.**

COLLATERAL SECURITY See **CONFISCATION ACT.**

1. **AGREEMENT TO ACCEPT IN PAYMENT—ONUS PROBANDI.** — A debtor who sets up as a defense that his creditor agreed to accept collaterals held by him in *satisfaction* of his debt, must clearly establish it. — *Brown v. Hiatt*, 372.
2. **ID.** — Circumstances stated rendering such an agreement improbable. — *Id.*
3. **DUTY AND LIABILITY OF HOLDER.** — The holder of a collateral security is not liable for a loss occurring without his fault; nor for neglecting to sue or look after the security when the person from whom it was received was to give it the requisite attention. — *Id.*
4. **CONFISCATION.** — Confiscation of collateral security as the property of creditor. under Act of July 17, 1862. — *Id.*

COLLISION. See **ADMIRALTY; RAILROAD.**

COMPOSITION AGREEMENT.

1. A provision "not to be binding on any one unless signed by *all* of the creditors," applies to secured as well as unsecured creditors — *Kinsing's Assignee v. Bartholew*, 155.
2. **Effect on insolvency of debtor.** — *Id.*

CONFISCATION ACT. See **REBELLION.**

1. **VALIDITY OF DECREE—COLLATERAL ATTACK.** — A decree condemning property under the confiscation act, where the record of the proceeding shows that a libel of information was duly filed, and a writ of monition issued and a return of service that the *res* has been attached, is not void on its face, and cannot be collaterally assailed in a bill to foreclose, by evidence that the *res* was always in the possession of the complainant. — *Brown v. Hiatt*, 372.
2. **CONFISCATION OF COLLATERAL SECURITIES—EFFECT.** — Where a collateral security was confiscated under the statute of July 17, 1862 (12 U. S. Stats. 589) because of acts charged against the creditor holding such collateral; *held*, that in stating an account between the parties, who were mortgagor and mortgagee, the latter should be charged with the full value of the note so confiscated as his property. — *Id.*

CONSTITUTIONAL LAW. See **SLAVERY.****I. National Constitution.**

1. **POWER OVER NAVIGABLE WATERS.** — The power of the federal government to improve public navigable waters, when called into exercise, is not only paramount but exclusive, and cannot lawfully be interfered with to any extent, by or under State authority. — *United States v. Duluth*, 469.
2. **ID.—REMEDY.** — United States may, in such cases, enjoin illegal interference by State authority. — *Id.*

CONSTITUTIONAL LAW (Continued)

3. **Id.—EVIDENCE** — Whether the work prosecuted under State authority will have the effect to interfere with that prosecuted under the federal authority, is a question of fact upon which the opinions of the government engineers, while entitled to great consideration, are not conclusive — *Id.*
4. **BANKRUPT ACT** — The bankrupt act is not unconstitutional for want of *uniformity* in the different States as to the amount of property exempted to the debtor — *In re Beckerford*, 45
5. **TREATY.** — A treaty may be superseded by a subsequent act of Congress. — *United States v. Tobacco Factory*, 264.
6. **FEDERAL AGENCIES.** — These are impliedly exempt from State taxation, but this doctrine does not apply to the Union Pacific Railroad Company, whose property is taxable by the States through which its road runs. — *Union Pacific Railroad Co. v. Lincoln County*, 314
7. **Rationale** and limitations of the doctrine of implied exemption of federal instrumentalities from State legislation, discussed — *Id.*
8. **OBLIGATION OF CONTRACTS.** — An act of the Iowa legislature, discriminating specially against taxes levied to pay judgments upon railroad bonds, was *held*, in view of the laws in force when the bonds were issued, to be in contravention of the provision of the constitution prohibiting States from passing laws "impairing the obligation of contracts." — *Lansing v. County Treasurer*, 522.
9. **THIRTEENTH AMENDMENT.** — Effect on slave contracts. — *Osborn v. Nicholson*, 219; *Buckner v. Street*, 248
10. **FOURTEENTH AMENDMENT** — Effect on the *status* of the Indians. — *Karrahoo v. Adams*, 344.

II *State Constitutions.*

11. **CONSTITUTIONAL LAW — MARTIAL LAW.** — Section 4, article 11, of the constitution of the State of Missouri, which in substance exempts persons from liability for acts done during the recent civil war, by virtue of military authority vested in them by the government of the United States, or in pursuance of an order received from any person vested with such authority, is valid, and protects from prosecution or action all who can show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States. — *Clark v. Dick*, 8
12. **Id** — Where in an action of trespass, the defendant pleaded, in substance, that civil war existed; that martial law was in force, and that the alleged trespasses were compulsory assessments, made upon the plaintiff or his property by virtue of an order of the commanding-general of the army in that department. *Held*, that the facts pleaded brought the case within the above-mentioned section of the constitution of the State, under which they were a good defense to the action. That provision of the constitution is not void because of its retrospective operation, nor because other provisions of the constitution may prohibit the *legislature* from passing retroactive statutes. Nor does it conflict with the national constitution limiting the power of the States; nor is it rendered invalid by the fifth amendment to the constitution, as that is a limitation on the powers of the general government, and not on those of the States. — *Id.*
13. **LIMITATION OF ACTIONS — REMOVAL OF CAUSES INTO THE FEDERAL COURTS.** — The facts above mentioned, pleaded as a defense to the action, bring the case within the two years' limitation clause of the Act of Congress of 1863 (12 U. S. Stats. 757), and this limitation is applicable to a case originating in a *State* court, and by virtue thereof properly removed into the federal court. — *Id.*
14. **Id.** — This statute, providing for the transfer of this class of cases into the federal courts, is constitutional (*Cooper v. Nashville*, 6 Wall. 247); and Congress

CONSTITUTIONAL LAW (Continued).

- has the power to regulate the remedy, and to prescribe the period within which suits must be brought. — *Id.*
15. *Id.* — This statute, by its terms, applies to all cases described therein, and the limitation period extends to and includes cases of the character mentioned in the *State* courts as well as in the federal courts. (*Arguendo*, per MILLER, J.) — *Id.*
 16. CONSTITUTION OF ARKANSAS—SLAVE CONTRACTS. — The constitution of Arkansas abolishing slavery and declaring all contracts for the purchase and sale of slaves void, does not conflict with the national constitution. — *Osborn v. Nicholson*, 219.
 17. RAILROAD AID BONDS. — The court declined, under circumstances, to hold bonds issued by a municipality, under express legislative authority of a State, to pay for stock subscribed in a railroad company void, because in conflict with the constitution of the *State*. — See *King v. Wilson*, 555; *Gilchrist v. Little Rock*, 261.
 18. Defenses to such bonds. — *Id.*, note; *Muscatine v. Railroad Co.*, 536 and note.
 19. *Id.* — Constitutionality of bonds issued by municipalities in aid of railways, and defenses thereto. — *Gilchrist v. Little Rock*, 261, and note; *King v. Wilson*, 555; *Muscatine v. Railroad Co.* 536, and note.
 20. RETROSPECTIVE LAWS. — Not necessarily unconstitutional. — *Schenck v. Peay*, 267.
 21. Uniformity of operation under special constitutional provision. See TAXES AND TAXATION.
 22. Iowa decisions on the constitutionality of railway aid legislation. — *King v. Wilson*, 555.

CONTEMPT. See WITNESS.

CONTRACT. See COLLATERAL SECURITY; LIMITATION OF ACTIONS; REBELLION.

1. EXECUTORY SLAVE CONTRACTS. — A remedy on a contract which is against sound morals, natural justice, and right, may exist by virtue of the positive law under which the contract was made; but can only be enforced so long as that law remains in effect — *Osborn v. Nicholson*, 219; *Buckner v. Street*, 248.
2. NOT NOW ENFORCEABLE. — A promissory note made in consideration of the price of a slave purchased before the adoption of the thirteenth amendment of the Constitution cannot be enforced, since that amendment destroyed not only slavery, but all its incidents, and all remedies growing out of a sale of slaves. (Per CALDWELL, J.) — *Osborn v. Nicholson*, 219; *Buckner v. Street*, 248.
3. Contracts by pre-emptioner on public lands. — *Kellom v. Easley*, 281.
4. RAILWAY CONTRACTS. — Executory contract to build railway will not ordinarily be specifically executed. — *Fallon v. Railroad Co.* 121.
5. MARITIME CONTRACTS. — *The Hardy*, 460.
6. Contracts by carrier limiting common law liability. — *Menzell v. Railroad Co.* 531.
7. USAGE. — Interruption of contract as affected by usage. — *Partridge v. Life Ins. Co.*, 139.
8. CANCELLATION. — Bill to cancel insurance policy. — *Home Ins. Co. v. Stanchfield*, 424.
9. Rate of interest. See INTEREST.

CONVEYANCE. See MINNESOTA STATUTES.

1. BY MARRIED WOMAN. — What essential in Minnesota to bar dower or pass her real estate. — *Drury v. Foster*, 460.
2. Effect of leaving material blanks. — *Id.* 460 and note.

CORPORATION. See MUNICIPAL CORPORATION; RAILROAD; UNION PACIFIC RAILWAY COMPANY.

Nature of corporate franchises and difference between alienable and inalienable franchises discussed. — *Union Pacific Railroad Co v. Lincoln County*, 314.

COUNTY WARRANTS. See *O'Brien County v. Brown*, 538.

COUPON. See JUDGMENT; MUNICIPAL CORPORATION.

1. How declared on. — *Railroad Co. v. Otoe County*, 338.
2. Rate of interest. — *Rogers v. Lee County*, 529.

CRIMINAL LAW. See ABATEMENT.

1. **CRIMINAL LAW — PLEAS IN ABATEMENT DEFINED.** — Pleas in abatement to an indictment are dilatory pleas; and not being favored, the law requires that they shall be pleaded with strict exactness. (*Arguendo.*) — *United States v. Williams*, 485.
2. **ID. — INDICTMENT.** — A plea in abatement construed to mean that the indictment should not be for the prosecution because an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill. — *Id.*
3. **ID. — Whether such a plea is good, *quere?*** Authorities cited. — *Id.*
4. **JURORS — DISQUALIFICATION OF.** — Distinction suggested between disqualification of a juror, absolutely pronounced by statute, such as alienage, non-residence, etc., and which would constitute cause of principal challenge, and a disqualification arising from bias, interest, and the like, which would constitute simply cause of challenge to the favor. (*Arguendo.*) — *Id.*
5. **INDICTMENT — PROSECUTOR MEMBER OF GRAND JURY — EFFECT.** — Where a prosecutor without any agency of his own, is drawn by lot from a large number of names to serve as a grand juror, and is sworn on the panel without objection, and prefers a charge, testifies, and takes part in the deliberations concerning it, and a bill is found, *held* (construing the acts of Congress relating to grand juries, and the statutes of the State respecting the *qualification* of grand jurors), that the mere fact that the prosecutor was a member of the jury, and participated in its proceedings would not be good ground for a plea in abatement to the indictment. — *Id.*
6. **QUALIFICATIONS OF GRAND JURORS — ACT OF JULY 20, 1840, CONSTRUED.** — The Act of Congress, of July 20, 1840, (5 U. S. Stats. 394), as to the "*qualification*" of grand jurors in the courts of the United States, discussed, and the opinion, *arguendo*, expressed that the word "*qualification*," as there used, referred to general qualifications, such as age, citizenship, etc., and not to bias, interest, and the like, which do not disqualify generally, but only at the instance of the party concerned, and where the effect of a challenge, if sustained, is not to exclude the juror from the panel, but only from acting in the case of the defendant who interposed the challenge. — *Id.*
7. **ID. — PRACTICE.** — Reasons drawn from the history of the grand jury, for requiring more jurors to be summoned than are necessary to concur in finding a bill, stated. — *Id.*
8. **PRACTICE ON OVERRULING PLEA IN ABATEMENT.** — Upon the verdict of a jury against a plea in abatement to an indictment, judgment was entered, overruling the plea, and allowing the defendant to plead not guilty. — *Id.*
9. **RECOGNIZANCE — REQUISITE OF VALIDITY — GENERAL PRINCIPLE.** — Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer. — *United States v. Goldstein's Sureties*, 413.

I. DILL. — 35.

CRIMINAL LAW (Continued).

10. **ID. — ILLUSTRATION.** — Accordingly, where, in distinct offenses two bonds, in different sums, were required, one bond for the aggregate amount was adjudged to impose no liability upon the sureties. — *Id.*
11. **EVIDENCE — DEFENDANT NOT COMPETENT.** — Defendant in criminal case, in the United States courts, cannot testify in his own behalf, although made competent by State statute. — *United States v. Hawthorne*, 422.
12. **RECOGNIZANCE — ARREST OF PRINCIPAL BY STATE AUTHORITY.** — The imprisonment of the principal cognizor in another State, for an offense against its laws, is no defense to his sureties in a recognizance to the United States for his failure to appear as required by the recognizance. — *United States v. Van Fossen*, 406.
13. **ID.** — Had the subsequent arrest been by the United States and not the States, *quere.*
14. **DEATH.** — Death of principal after forfeiture does not exonerate the sureties.
15. **SALE OF LIQUOR TO INDIANS.** — Clause "Indian under charge of Indian superintendent, or agent appointed by the United States," construed. — *Flynn's Case*, 451.
16. **CONSPIRACY TO RESIST OFFICER.** — If client and his attorney enter into a conspiracy to resist an officer, both are punishable. — *United States v. Smith*, 212.
17. **INDICTMENT FOR RESISTING PROCESS — ACTUAL VIOLENCE.** — In an indictment for resisting an officer, actual violence need not be shown. — *Id.*
18. **JURISDICTION OF NATIONAL COURTS.** — Criminal jurisdiction over Indians for crimes committed within State limits, off reservations. — *United States v. Yellow Sun*, 271.
19. **JURISDICTION OVER INDIANS — PRACTICE.** — The court, on its own motion, arrested judgment in a capital case against Indians, and made a special order turning them over to the State authorities. — *Id.*

DAMAGES.

1. **EXEMPLARY AND COMPENSATORY.** — Difference between *exemplary* and *compensatory* damages stated, and circumstances enumerated which will authorize a jury to give damages of the former kind. — *Berry v. Fletcher*, 67; *Holmes v. Sheridan*, 351; *Ware v. Water Co.*, 465; *Beale v. Railway Co.*, 568.
2. **TRESPASS.** — Rules for assessing damages against joint trespassers. — *Berry v. Fletcher*, 67.
3. **INFRINGEMENT OF TRADE-MARK.** — *Hostetter v. Vowinkle*, 329.
4. **For personal injury**, caused by the defendant's negligence. — *Ware v. Water Co.*, 465.
5. **In action for false imprisonment.** — *Berry v. Fletcher*, 67; *Holmes v. Sheridan*, 351.
6. **Railway corporations liable to exemplary damages** for an accident to passenger, caused by a drunken engineer. — *Beale v. Railway Co.*, 568.

DEED.

Conveyances by pre-emptioner on public lands before patent issued are, it seems, void. — *Kellom v. Easley*, 281.

DEPOSITION. See RULES OF COURT in APPENDIX.

Taken by a party, may, under circumstances, be used by his adversary. — *Andrews v. Graves*, 108 and note.

DIRECT TAX ACT.

Construction of acts of Congress on this subject. — *Schenck v. Peay*, 267.

DISCOVERY. See EQUITY.

DISTILLER AND DISTILLERY. See INTERNAL REVENUE.

DISTRICT COURT. See BANKRUPT LAW; CIRCUIT COURT.

EJECTMENT. See REMOVAL OF CAUSES.

Defendant in ejectment cannot set up an equitable title in the court of the United States. — *Lariviere v. Madegan*, 455.

EQUITY. See BANKRUPT LAW; FRAUD; INSURANCE; JUDGMENT; LACHES; LIMITATION OF ACTIONS; PATENTS FOR INVENTIONS; TRADE-MARK.

1. **PARTIES — IMPROPER JOINDER — GENERAL DEMURDER.** — If one who has no interest in the subject-matter of the suit, or in the belief prayed, be joined as plaintiff, the defect may be reached by a general demurrer for want of equity. — *Hodge v. R. R. Co.* 104.
2. **JURISDICTION TO RECOVER BACK ILLEGAL EXCESS OF INTEREST.** — Equity will entertain a bill by an usurious borrower or his assignee in bankruptcy to recover illegal excess of interest; the remedy is not alone at law. — *Darby v. Boat Sav. Inst.* 141; *Bean v. Brookmire*, 151.
3. **EQUITY JURISDICTION — BILLS TO CANCEL INSURANCE POLICIES FOR FRAUD.** — A bill in equity by an insurance company against the assured, to enjoin an action at law on the policy, and to cancel the same because it was procured by false and fraudulent representations, ought to be dismissed when it is solely founded upon matters which, if true, are a defense to the law action, and where no reasons are shown making a resort to equity necessary or expedient. — *Home Ins. Co. v. Stanchfield*, 424.
4. **ID. — WHEN REMEDY IS ADEQUATE AT LAW.** — Accordingly, where such a bill was not filed until after the loss had happened, and where, in consequence of a short limitation clause in the policy and averments in the bill that an action was threatened, it appeared there was no danger of long or indefinite delay, and where no reason was shown why the matters charged in the bill were not plainly available as a complete defense at law, the court dissolved the injunction and dismissed the bill. — *Id.*
5. **ID. — WHEN BILL WILL LIE.** — It seems that such a bill would lie if filed before loss. (Per MILLER, J., and DILLON, J., *arguendo*.) — *Id.*
6. **ID. — DISCOVERY.** — Where discovery is the ground of equity jurisdiction, if the discovery fails, the bill must be dismissed, although there may be evidence *alunde* sufficient to establish a right to relief. — *Id.*
7. **ID. — PARTIES COMPETENT TO TESTIFY.** — *Quere*, as the effect of legislation, making parties to suits competent witnesses, and compelling them to testify at the instance of their adversary, upon the right to file a bill merely to obtain a discovery in aid of another action or defense. — *Id.*
8. **EQUITY — UNREASONABLE DELAY NOT FAVORED.** — Equity views with disfavor, unreasonable and unexplained delay in the assertion of rights, especially where the rights depend on oral evidence and the situation and value of the property affected have, in the mean time, greatly changed. — *Murphy v. Painter*, 333.
9. **ID. — DURESS — UNREASONABLE DELAY.** — Accordingly, a bill to set aside a deed for duress, alleged to have been practiced twelve years before, was dismissed, the complainant being without sufficient excuse for the delay, and the defendant having made costly and permanent improvements upon the property, and the evidence as to the duress being conflicting and unsatisfactory. — *Id.*
10. **BILL OF REVIEW — REQUISITES.** — A bill of review should state the former proceedings, and wherein the party exhibiting it considers himself aggrieved; the sufficiency of allegations in this respect considered. — *Kellom v. Easley*, 281.
11. **SPECIFIC PERFORMANCE OF RAILWAY CONTRACTS.** — The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for

EQUITY (Continued).

its road, to erect the necessary buildings, and to build bridges, etc., and were to be paid in mortgage bonds and stock, but the complainants (in consequence, as alleged, of defendant's fault), had not entered upon the work; the road-bed to be graded and prepared by the company was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors seeking to enjoin the company from making a contract with others to iron and equip the road, and praying a *specific execution* of their contract with the company, and refused to retain the bill for compensation. — *Fallon v. The Railroad Co.*, 121.

12. **ID. — COMPENSATION — DAMAGES.** — Principles which govern courts of equity in retaining bills for compensation in damages, discussed by TREAT, J. — *Id.*
13. **EQUITY — WRIT OF ASSISTANCE.** — The power of a court of chancery to put the purchaser of the mortgaged premises into possession by a writ of assistance, or summary proceedings, extends only to the parties to the suit and those coming in under them after suit commenced, and does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative, by statute. — *Thompson v. Smith*, 458.
14. **ID.** — It does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative, by statute. — *Id.*

ERROR, WRIT OF. See **APPEAL**; **BANKRUPT LAW**; **SUPERSEDEAS BOND**.

ESTOPPEL.

Of insurance company by acts and conduct of its local agent. — *Geib v. Ins Co.*, 443, 449.

EVIDENCE. See **BANKRUPT LAW**; **INSURANCE**.

1. **COMPETENCY OF PARTIES AS WITNESSES.** — Where by the laws of a State parties are both competent and compellable to testify, the same rule, under the legislation of Congress, applies to civil actions in the federal courts sitting therein; and one of the parties may, in such an action, be *compelled* to testify at the instance of the adverse party. — *Berry v. Fletcher*, 66.
2. **COMPETENCY OF PARTIES AS WITNESSES.** — Since the Act of Congress of July 2, 1864 (13 Stats. 351, § 3), making parties competent witnesses (however it might have been before), a complainant in chancery who takes the deposition of a respondent, adversely interested, though without a previous order of court specially reserving his rights, does not by operation of law thereby *release* the respondent who gives his testimony from the liabilities set up against him in the bill. Nor does the complainant, by such act, *estop* himself to deny the truth of the evidence given by the respondent. — *Rison v. Cribbs*, 181.
3. **CIVIL ACTION — WHAT INCLUDED.** — The phrase "*civil action*," in the statute of July 2, 1864, is used in distinction from *criminal* actions (*Green v. United States*, 9 Wall. 655), and includes *suits in chancery* as well as *actions at law*. (Per MILLER, J.) — *Id.*
4. **PARTIES — TESTIMONY UNDER COMPELSION.** — Whether under this act an unwilling party can be *compelled* to testify, except in cases where before the act he would be bound to do so. *Quere?* — *Id.*
5. **EVIDENCE OF PARTIES — ACT OF JULY 2, 1864.** — This act of Congress was designed "to introduce a very important change amounting to a revolution in the law of evidence, and it is not for the courts to counteract the legislative will by distinctions at variance with the general scope of the new principle intended to be established." (Per MILLER, J., *arguendo*.) — *Id.*

EVIDENCE (Continued).

6. **GOVERNMENT ENGINEERS.** — Their opinion as to whether a work being prosecuted under State authority will interfere with that prosecuted under federal authority, is not conclusive on the courts. — *United States v. Duluth*, 469.
7. **FRAUDULENT BURNING OF PROPERTY BY ASSURED.** — Degree of evidence required to establish. — *Scott v. Ins. Co.* 105.
8. **WIFE.** — The wife of a bankrupt is a competent witness in a proceeding before the register in bankruptcy to ascertain the condition of his estate, but she is not a competent witness for or against the husband in a motion or proceeding to set aside the discharge granted to him as a bankrupt. (Per TREAT, J.) — *Tenny v. Collins*, 66, note.
9. **CONFESSIONS WHEN NOT EVIDENCE.** — Confessions extorted from the plaintiff, or those not voluntarily made, should not be regarded by the jury. — *Scott v. Home Ins. Co.* 105.
10. **DEPOSITIONS—WHEN ADVERSARY MAY USE.** — Depositions taken by one party may, under circumstances, be read by the other. — *Andrews v. Graves*, 108, note.
11. **FEES OF WITNESS.** — If demanded and not paid, witness in a civil case, not in contempt. — *In re Thomas*, 420.
12. **MILEAGE OF WITNESS.** — Entitled to actual distance traveled. — *Id.*

EXECUTION. See MORTGAGE; RULES OF COURT.

Power to award general execution in foreclosure decrees. — *Phelps v. Loyhed*, 512.

EXECUTOR AND ADMINISTRATOR.

1. **PLEA OF PLENE ADMINISTRAVIT.** — Where the statute classifies the debts against an estate, directs the order of payment, and only makes an administrator liable to the extent of assets received, the common law plea of *plene administravit* is no defense, and is not proper in an action against the executor merely seeking to establish the existence of plaintiff's debt against the estate. — *Covington v. Burnes*, 16.
2. **Rights of executor of patentee of an invention.** — *Hodge v. North Mo. R. R.*, 104.

EXEMPTION LAWS. See BANKRUPT LAW.

ESTATES. See EXECUTOR.

FALSE IMPRISONMENT.

Measure of damages in actions against military officer. — *Holmes v. Sheridan*, 351.

FEDERAL AND STATE JURISDICTION. See BANKRUPT LAW; CONSTITUTIONAL LAW; HABEAS CORPUS; INDIANS; INJUNCTION; TAXES AND TAXATION.

FILLING BLANKS.

In conveyances of real estate. — *Drury v. Foster*, 460.

FORECLOSURE. See BANKRUPT LAW; EQUITY; LIMITATION OF ACTIONS; REBELLION.

FOREIGN JUDGMENT. See JUDGMENT.

1. **Defenses to actions on.** — *Arnott v. Webb*, 362.
2. **Assignee subject to equities.** — *Id.*; *O'Brien County v. Brown*, 588.

FORFEITURE. See INTERNAL REVENUE.

STATUTE—HOW CONSTRUED. — Courts will not construe laws denouncing forfeitures as extending to property *bona fide* sold to third persons before seizure, unless the *intention* of Congress that the forfeiture should be absolute and instantaneous on the commission of the offense be manifest and unmistakable. — *United States v. One Hundred Barrels*, 49.

FRAUD. See **BANKRUPT LAW.**

Jurisdiction in equity over fraud and fraudulent contracts. — *Darby v. Boatm. Sav. Inst.*, 141; *Bean v. Brookmire*, 151; *Insurance Co. v. Stanchfield*, 424.

FRAUDULENT CONVEYANCE. See **BANKRUPT LAW.**

1. When statute of limitations applies in equity in cases of fraudulent sales and conveyances. — *Martin v. Smith*, 85.
2. **SECURITY BY ABSOLUTE DEED.** — The bankrupt act does not avoid a security otherwise valid, because it is taken in the form of an absolute deed instead of a mortgage. — *Gaffney's Assignee v. Signaigo*, 158.

GRAND JURY. See **ABATEMENT**; **CRIMINAL LAW.**

1. Qualification of jurors. — *United States v. Williams*, 483.
2. Reasons for requiring more than twelve to be summoned. — *Id.*

HABEAS CORPUS. See **ARMY ENLISTMENT.**

1. **IMPRISONMENT UNDER STATE AUTHORITY.** — Federal courts cannot discharge a relator from custody under process of a State court, although issued by the State court in a suit relating to the property of Indians, over which it has no jurisdiction. — *Ex parte Forbes*, 364; *United States v. Van Fossen (arguendo)*, 406.
2. **HABEAS CORPUS—ENLISTMENT INTO MILITARY SERVICE.** — The validity of an enlistment into the military service of the United States may be inquired into by a United States judge on habeas corpus, and if fraudulently procured, the recruit may be discharged. — *Ex Parte Schmeid*, 587.
3. **ID.—MARRIED MEN.** — If a party enlists as a married man, the fact that he has a wife and child does not entitle him to be discharged on habeas corpus. — *Id.*

HOMESTEAD EXEMPTION. See **BANKRUPT LAW.**

HOMICIDE. See **CRIMINAL LAW**; **INDIANS.**

"HOT SPRINGS" RESERVATION.

1. Act of April 20, 1892 (4 U. S. Stats. 505), declaring that the "Hot Springs," in Arkansas, "should not be entered, located, or appropriated," etc., construed to segregate the land from the public domain, and that a "squatter" thereon could not recover from his lessee *ground rent* for the use of such lands. — *Dupos v. Wassell*, 213.
2. *Ground rent* distinguished from *improvements*. — *Id.*

INDIANS.

1. **INDIAN COUNTRY—POWER OF CONGRESS OVER.** — The Indian country is within the jurisdiction of the United States, and Congress may exercise municipal legislation over it. — *United States v. Tobacco Factory*, 264.
2. **ID.—INTERNAL REVENUE LAWS.** — The internal revenue tax, provided by section 107 of the Act of July 20, 1868, is valid, and collectible in the Indian country. — *Id.*
3. **TREATY—ABROGATION BY CONGRESS.** — Congress may abrogate a treaty so far as it is municipal law, provided the subject-matter is in the legislative power of Congress. — *Id.*
4. **INDIANS WITHIN STATE LIMITS—JURISDICTION OF FEDERAL COURTS.** — Indians, though belonging to a tribe which maintains the tribal organization, but occupying a reservation *within* the limits of a State, where there are no statute or treaty provisions, granting or retaining jurisdiction in favor of the United States, over offenses committed by them, are amenable to State laws for murder or other offenses against such laws, when committed *off* the reservation, and within the limits of the State. — *United States v. Yellow Sun*, 272.

INDIANS (Continued).

5. JURISDICTION OVER OFFENSES UPON RESERVATION. — As to jurisdiction of United States courts, over offenses, under such circumstances, committed by Indians upon reservations, *quere?* — *Id.*
6. JURISDICTION — ARREST OF JUDGMENT BY COURT ON ITS OWN MOTION. — The court in a capital case against Indians, though neither party asked it, and both demanded judgment, on a verdict of guilty, arrested the judgment *on its own motion*, for want of jurisdiction in the court over the offense charged. — *Id.*
7. *Id.* — Under these circumstances the court, after arresting the judgment, instead of at once discharging the defendants, made a special order for turning them over to the State authorities. — *Id.*
8. INDIANS — RELATION TO FEDERAL AND STATE GOVERNMENTS. — The relations which Indians residing within State limits sustain to the general government, and that of the State, discussed by the circuit judge. — *Id.*
9. INDIANS — CITIZENSHIP — JURISDICTION. — An Indian residing within the United States is not a "foreign citizen or subject" within the meaning of section 2, article iii., of the constitution, and cannot, on the ground that he is a "foreign citizen or subject," maintain a suit in the circuit court of the United States. — *Karrahoo v. Adams*, 344.
10. *Id.* — FOURTEENTH AMENDMENT. — As to the effect of the fourteenth amendment upon the *status* of the Indians, see note at the end of the opinion. — *Id.*
11. KAW HALF-BREED LANDS — INDIAN RESERVATION — TAX TITLES. — A sale of lands for taxes in Indian reservation not subject to State taxation is void. — *Swope v. Purdy*, 349.
12. TAX TITLES — VALIDITY ON LANDS EXEMPT BY FEDERAL AUTHORITY. — A State Statute of Limitations is not applicable to a sale of lands exempted, by federal authority, from State taxation. — *Id.*
13. PARTITION — INDIAN LANDS. — A State court has no jurisdiction over a partition suit in relation to lands of the Shawnee Indians which have never been conveyed with the secretary of the interior. — *Ex parte Forbes*, 363.
14. Relations to State and federal governments discussed. — *Flynn's Case*, 451.
15. INDIAN COUNTRY. — Authority of military commander therein. — *Holmes v. Sheridan*, 351.
16. SALE OF LIQUORS TO INDIANS. — Statute of Congress, as to what constitutes an Indian in charge of an Indian agent or superintendent, construed. — *Flynn's Case*, 451.
17. MINNESOTA HALF-BREED TRACT. — Acts of July 17, 1854, and May 19, 1858, construed. — *Larrieviere v. Madegan*, 455.
18. *Id.* — Location by scrip under Act of July 17, 1854, equivalent to a patent. — *Id.*

INDICTMENT. See ABATEMENT; CRIMINAL LAW.

INDORSER.

1. Notice to indorser when living in same city. — *Spalding v. Krutz*, 414.
2. When living outside of city limits, having business place within the city. — *Id.*
3. Notice of protest, with printed signature of the notary, valid. — *Id.*

INJUNCTION. See BANKRUPT LAW; JUDGMENT.

1. INJUNCTION — UNITED STATES MAY PROTECT IMPROVEMENTS ON RIVERS BY. — The United States may bring an injunction bill, in the proper circuit court, to protect improvements, which she is making under the authority of Congress, in navigable waters, from injury which will be caused by works of internal improvement within State limits, and by State authority. The power of the federal government, when called into exercise, is, in such cases, not only paramount

INJUNCTION (Continued).

- but exclusive, and cannot lawfully be interfered with to any extent. — *United States v. City of Duluth*, 469.
2. **RESPECTIVE POWERS OF NATIONAL AND STATE GOVERNMENTS OVER NAVIGABLE WATERS.** — Whether the work prosecuted under State authority will have the effect to interfere with that prosecuted under the federal authority, is a question of fact upon which the opinions of the government engineers, while entitled to great consideration, are not conclusive. — *Id.*
 3. **ID. — TEMPORARY INJUNCTION.** — Where the injury threatened is of a character not easily remedied, if the injunction be refused, and there is no denial that the act charged is contemplated, a temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted. — *Id.*
 4. Will be granted to protect the right to a trade-mark. — *Hostetter v. Vowinkle*, 829.
 5. To restrain a city corporation from removing the track of a railway company occupying its streets. — See *Railroad Co. v. Leavenworth*, 893.
 6. When equity will refuse to enjoin judgment at law. — *Muscatine v. Railroad Co.*, 536.

INSANITY.

1. A person *wholly insane* cannot commit an act of *bankruptcy*. — *In re Marvin*, 178.
2. *Life Insurance* company liable, if the *self-destruction* of the assured happens as a direct consequence of his insanity. — *Terry v. Ins. Co.*, 403.
3. *No presumption* of insanity from the mere act of self-destruction. — *Id.*
4. *Onus probandi* on the party alleging the insanity. — *Id.*

INSOLVENT LAWS.

1. Effect of bankruptcy act upon assignments under State law. — *In re Burt*, 489.
2. **STATE INSOLVENT LAWS — ALIEN CREDITORS — DISCHARGE.** — State insolvent acts are valid as to subsequent contracts between citizens or inhabitants of the State enacting the law; and a discharge of the debtor thereunder is as binding upon an *alien* creditor residing or domiciled in the State at the time when the contract was made and the discharge granted as it would be upon creditors who were naturalized aliens or native born citizens residing in the State. — *Von Glahn v. Varenne*, 515.
3. **VALIDITY OF STATE INSOLVENT LAWS.** — The grounds upon which the validity of State insolvent laws are sustained, discussed. — *Id.*

INSURANCE.

I. *Fire Insurance.*

1. **EVIDENCE TO ESTABLISH FRAUDULENT BURNING.** — In an action on a fire policy, where the defense is that the assured burned the property, the rule in civil, and not the one in criminal, cases, as to the *quantum* of proof, applies; but the evidence to establish it ought to be such as clearly to satisfy the jury of its truth. — *Scott v. Home Ins. Co.* 105.
2. **REFUSAL TO ANSWER.** — Under certain provisions of a fire insurance policy, the refusal of the assured to submit to an examination on oath, or to answer material questions respecting the loss, was considered not to work a forfeiture of the policy, but only not to cause the loss not to be payable until this was done; and such refusal should be pleaded in abatement, and separately from defenses in bar. — *Weide v. Germania Insurance Company*, 441.
3. **ID. — FALSE STATEMENT ON OATH BY ASSURED.** — False statements on oath by the assured, with intent to deceive the company, relative to the terms of settlement with *other* companies having risks on the same property, are material, and will defeat any right on the part of the assured to recover. — *Id.*

INSURANCE (Continued).

4. **ID. — EFFECT OF FRAUD.** — If the assured, after the loss, with intent to deceive the company, exhibits to it books of accounts containing false entries of a material nature, this is a fraud, and will defeat all right to recover upon the policy. — *Id.*
5. **PRIMA FACIE CASE.** — If the plaintiff on the trial of an action on a policy of fire insurance produces the policy, and shows the loss, the delivery of the preliminary proofs, and the value of the property destroyed by the fire, he makes out a *prima facie* case. — *Grib v. International Ins. Co.*, 448.
6. **ID. — FRAUDULENT OVER-VALUATION.** — Fraudulent over-valuation of the property in the preliminary proofs held to be a "fraud" "or attempt at fraud," within the terms of the policy, and to defeat any right to recover thereunder. — *Id.*
7. **ID. — FALSE STATEMENTS BY ASSURED.** — False statements by the assured in the application respecting the existence of a mortgage on the property insured, held to avoid the policy. — *Id.*
8. **ID. — ESTOPPEL.** — What acts and conduct on the part of the local agent of the company, who wrote out the application and issued the policy, will estop the company to set up the existence of the mortgage to defeat the action. — *Id.*
9. **SUBSEQUENT INSURANCE IN OTHER COMPANIES.** — Subsequent insurance by the assured in other companies in contravention of the terms of the policy will, if it so provides, avoid the same. — *Id.*
10. **ID. — WAIVER BY COMPANY OF CONDITIONS IN POLICY.** — Certain circumstances held to amount in law to a waiver by the company of the condition of the policy respecting the amount allowed to be insured in other companies. — *Id.*
11. **LOCAL AGENTS — POWERS.** — Waiver of conditions in policies by local agents. — *Id.*, 451, note.
12. **APPLICATION — FILLING UP.** — The local agent, in filling up applications, may be the agent of the company. — *Id.*, 451, note.
13. **AGENT — NOTICE.** — Notice to agent in other transactions binds the company, if in his mind at the time. — *Id.*
14. **CONSTRUCTION OF POLICY AS TO PROPERTY COVERED BY IT.** — A policy describing the property insured as "blacksmith and carriage maker's stock, manufactured, and in process of manufacture, contained in a certain building," embraces *unmanufactured* or *raw stock* of the kind mentioned in the policy. — *Spratley v. Ins. Co.*, 392.
15. **ACCEPTANCE OF DEFECTIVE PROOFS OF LOSS.** — Where, in an action on an insurance policy, issue is taken upon a plea setting up that the proofs of loss were not furnished as required by the policy, the plaintiff may show that proofs, in some respects defective, *were accepted* by the company as sufficient. — *Id.*
16. **ID.** — Acceptance of defective proofs may be inferred from failure to object, and placing refusal to pay on other grounds. — *Id.*
17. **PARTIES — REAL PARTY IN INTEREST.** — An order on an insurance company, given by the assured, after the loss, to a creditor, directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order the assignee of the cause of action and the real party in interest. — *Id.*

II. Life Insurance.

18. **LIFE INSURANCE — COMPENSATION OF AGENTS — USAGE.** — In an action by the former local agent of a foreign life insurance company against the company to recover the commuted value of commissions on the renewal of policies after the plaintiff was discharged, it appeared that the contract fixing the plaintiff's compensation was contained in a letter from the secretary of the company, to him, which stated: "You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent." It was held, in substance,

INSURANCE (Continued).

that the plaintiff could not show a local usage among *other* companies, not including the defendant's company, to pay the commuted value of premiums during the whole existence of the policy, should the agent who procured the policy be discharged, or cease to act for the company.— *Partridge v. Life Ins. Co.*, 189.

19. **LIFE INSURANCE—SELF-DESTRUCTION—EFFECT OF INSANITY.**—Insanity on the part of the assured which irresistibly impelled him to take his own life, or existing to such an extent as to render him incapable of forming a rational judgment with respect to the act of self-destruction, will so far excuse him as to render the company liable, notwithstanding the policy contains a condition avoiding liability thereon, in case the assured shall "die by his own hand."— *Terry v. Life Insurance Company*, 403.
20. **INSANITY—BURDEN OF PROOF.**—The burden of proof to establish the insanity is, in such cases, upon the plaintiff, by whom it is alleged.— *Id.*
21. **SELF-DESTRUCTION—PRESUMPTION FROM INSANITY.**—There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity.— *Id.*
22. **BILL IN EQUITY TO CANCEL—JURISDICTION.**—A bill in equity by an insurance company against the assured, to enjoin an action at law on the policy, and to cancel the same because it was procured by false and fraudulent representations, ought to be dismissed when it is solely founded upon matters, which, if true, are a defense to the law action, and where no reasons are shown making a resort to equity necessary or expedient.— *Ins. Co. v. Stanchfield*, 424.
23. **Id.**—The foregoing principle applied, and bill dismissed.— *Id.*
24. **Id.**—**WHEN BILL WILL LIE.**—Such a bill will lie if filed before the loss, or where for any reason a resort to equity is proper. (*Arguendo.*)— *Id.*

INTEREST.

1. **RATE TAKEN BY CORPORATIONS.**—Exceeding the charter rate of interest, where the charter is silent as to the effect or penalty, does not invalidate the whole contract, but only the excess beyond the legal rate.— *Darby's Trustees v. Boatman's Sav. Inst.*, 141.
2. **REMEDY FOR EXCESS BEYOND LEGAL RATE.**—Excess may be recovered back in equity.— *Id.*
3. **RATE.—COUPONS—JUDGMENTS.**—Under the statutes of Iowa, which provide that six per cent shall be the legal rate of interest in the absence of a contract in writing, fixing, in terms, a higher rate, and that "*judgments and decrees shall draw interest at the rate expressed in the contract,*" not exceeding ten per cent, a *judgment* upon coupons made in Iowa, payable in New York (where the legal rate of interest is seven per cent), but *silent as to interests*, or the rate thereof, should be made to draw interest at the rate of six, and not seven per cent per annum.— *Rogers v. Lee Co.*, 529.

INTERNAL REVENUE.

1. **INTERNAL REVENUE ACT—CONSTRUCTION—FORFEITURE.**—Courts will not construe laws denouncing forfeitures as extending to property *bona fide* sold to third persons before seizure, unless the *intention* of Congress that the forfeiture should be absolute and instantaneous on the commission of the offense be manifest and unmistakable.— *United States v. One Hundred Barrels Spirits*, 49.
2. **Id.**—Revenue laws inflicting penalties for their violation are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention.— *Id.*
3. **Id.**—Under the Internal Revenue Act of July 13, 1866 (14 U. S. Stats. 98), a *removal* by a distiller of spirits, distilled by him, from the place of distillation to

INTERNAL REVENUE (Continued).

- a bonded warehouse is a legal act, and it cannot be predicated of such a removal where this is the only overt act charged, that it was done to defraud the United States of the tax thereon so as to bring the case within those contemplated by section 14 of the above-mentioned Act of Congress. — *Id.*
4. *Id.* — Under the Internal Revenue Act of July 13, 1866, as amended March 2, 1867 (14 U. S. Stats. 483), distilled spirits purchased by the claimant *bona fide* while they were in a bonded warehouse of the United States, to whose collector he paid the taxes due thereon, cannot afterwards be seized in his hands and condemned as forfeited by reason of the previous failure of the distiller, in the course of the manufacture thereof, to keep the books and to make the tri-monthly reports required of him by law. — *Id.*
 5. *Id.* — REPEAL OF STATUTE BY IMPLICATION. — As repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the repugnance is positive, and then only to the extent of such repugnance. *Held*, that the fifth section of the Act of March 31, 1868 (15 U. S. Stats. 58), is not a repeal of that part of the twenty-fifth section of the Act of March 2, 1867 (14 U. S. Stats. 483), which denounces penalties against distillers for failing to make the entries and reports required of them by law. — *Id.*
 6. INTERNAL REVENUE ACT — FORFEITURES. — The legislation of Congress respecting forfeitures against distillers reviewed, and the conclusion reached that it showed an uniform policy, from the beginning, not to extend forfeitures to property in the hands of innocent third persons. — *Id.*
 7. *Id.* — ESTOPPEL. — Whether under the peculiar provisions of the internal revenue acts the government, by receiving and retaining the taxes paid to it on spirits, in a bonded warehouse, by an innocent purchaser, would be *estopped* as against such a purchaser to enforce a forfeiture by reason of a prior default on the part of the distiller, the court gave no opinion. — *Id.*
 8. DISTILLERS' TAX. — Under Act of July 20, 1868, a distiller must pay tax on eighty per cent of the *producing capacity* of his distillery. — *United States v. Nissley*, 586.
 9. INDIAN COUNTRY. — Internal revenue laws extend over the Indian country. — *United States v. Tobacco Factory*, 264.

IOWA.

1. Mode of enforcing judgments in Iowa against municipal corporations. See MANDAMUS; MUNICIPAL CORPORATION.
2. Rules of circuit court for district of Iowa. See APPENDIX.
3. Course of decision and legislation in Iowa in aid of railways. — *King v. Wilson*, 555.

JUDICIAL NOTICE.

Taken of municipal charters. — *Fauntleroy v. Hannibal*, 118 and note.

JUDGMENT. See COUPON; INTEREST; JURISDICTION; MUNICIPAL CORPORATION.

1. FOREIGN JUDGMENT — DEFENSES TO ACTION ON. — In an action on a foreign judgment the debtor may plead as a defense that he was not served with a process, and that the attorney who entered an appearance and filed an answer for him, had no authority to do so. — *Arnott v. Webb*, 362.
2. RIGHTS OF ASSIGNEE OF FOREIGN JUDGMENT. — Where one of several joint or co-partnership debtors himself pays off the judgment to the creditor, and causes it to be assigned to a third person, who advanced to the debtor the money with which he paid it, on an understanding *between them* (to which the creditor was not a party, nor the other joint debtors), that he was to have the benefit of the assignment as a security for his loan. *Held*, that such assignee could not

JUDGMENT (Continued).

maintain an action against the other debtors, on the judgment thus assigned to him. — *Id.*

3. **ENJOINING JUDGMENT AT LAW—MISTAKES CORRECTED, How.**—Matters, such as fraud, which should have been pleaded as a defense, are not sufficient grounds, after judgment, upon which to apply to equity to enjoin process to collect the judgment. — *Muscatine v. Railroad Co.*, 536.
4. **Id.**—Where, by complainant's own carelessness (no fraud or malfeasance in this behalf being charged against the creditor), judgment in an action on coupons is, by a clerical mistake, rendered for too large a sum, a proper remedy of the creditor is to apply to the court which rendered it to have it corrected; and where the alleged mistake was not plainly shown, and if it existed, could not have happened except for the debtor's laches, and no application had been made to correct the judgment, an injunction to restrain process to enforce such judgment was denied. — *Id.*
5. **Id.**—A creditor, having an obligation of a *principal debtor and of a surety*, may pursue his remedy against both for the satisfaction of the debt; and if the creditor has reduced his claim against the primary debtor to judgment, equity will not enjoin process to enforce the judgment at the instance of such debtor, on the ground that the creditor is also pursuing the surety and has seized a fund, which is in litigation, belonging to the surety; but the creditor can have only one satisfaction. — *Id.*
6. **BILL TO ANNUL JUDGMENT—JURISDICTION.**—Bill to set aside a judgment fraudulently obtained in the circuit court, lies without regard to citizenship. — *O'Brien County v. Brown*, 588.
7. Judgment on county warrants fraudulently issued, effect of. — *Id.*
8. Collateral attack on judgment. See **CONFISCATION ACT**.

JURISDICTION. See **CIRCUIT COURT**; **CONFISCATION ACT**.

1. Of federal courts in admiralty. See **ADMIRALTY**.
2. In bankruptcy. See **BANKRUPT LAW**.
3. In chancery. See **EQUITY**.
4. Civil and criminal over Indians and Indian reservations. See **CRIMINAL LAW**; **HABEAS CORPUS**; **INDIANS**.
5. Over causes removed from State court. See **REMOVAL OF CAUSES**.
6. **JURISDICTION—FRAUDULENT JUDGMENT.**—The circuit court has jurisdiction of a bill in equity, filed by defendant in a judgment rendered therein, against an assignee of a judgment plaintiff, to set aside the judgment for fraud, though both assignee and plaintiff be citizens of the same State, as such proceeding is merely a continuation of the original suit. — *O'Brien County v. Brown*, 588.

JURY. See **CRIMINAL LAW**.

Number and qualification of grand jurors. — *United States v. Williams*, 485

KANSAS CODE AND STATUTES.

1. *Kansas Statute of Limitations* construed. — *Sohn v. Waterson*, 858; *Brown v. Hiatt*, 372; *Scope v. Saine*, 416; *Scope v. Purdy*, 349; *Barlow v. Barner*, 418.
2. Kansas code as to parties to actions at law, "real party in interest," construed. — *Spratley v Insurance Co.*, 892; *Perkins v. Ingersoll*, 417.
3. Kansas statute as to use of streets by railway companies, construed. — *Railroad Co. v. Leavenworth*, 393.
4. Rules in circuit court for Kansas district. See **APPENDIX**.

LACHES. See **LIMITATION OF ACTIONS.**

1. Equity views laches with disfavor. — *Murphy v. Paynter*, 338.
2. Effect on Statute of Limitations in equity. — *Martin v. Smith*, 85; [*Meander v. Norton*, 11 Wall. 442;] *Phelps v. Loyhed*, 512; *O'Brien County v. Brown*, 588.

LANDLORD AND TENANT.

Tenant not in all cases estopped to deny his landlord's title. Instance, see *Dupas v. Wassell*, 213.

LAND OFFICE RECEIVER.

Compensation of local land office receiver of public money. Equitable allowances under Act of March 3, 1797. — *United States v. Lowe*, 585.

LIFE INSURANCE. See **INSURANCE.**

LOOKOUTS.

1. **WHERE STATIONED.** — Pilot house not ordinarily proper place, at night. — *Hazlett v. Conrad*, 79.
2. Masters not proper lookouts. — *Id.*

LIMITATION OF ACTIONS.

1. **STATE LIMITATION STATUTES IN FEDERAL COURTS.** — Unless Congress has otherwise provided, State Statutes of Limitation are applied to controversies in the courts of the United States. — *Martin v. Smith*, 85; *Brown v. Hiatt*, 372.
2. **ACTS DONE DURING THE REBELLION.** — The Act of March 3, 1863, providing a two years' limitation for suits for acts done or omitted during the rebellion, by virtue or under color of authority derived from the president, or under any act of Congress, is constitutional, and is applicable to a case originating in a State court and removed into the federal court. — *Clark v. Dick*, 8.
3. A special plea construed, and held to be within this limitation statute. — *Id.*
4. **STATUTE OF LIMITATIONS IN EQUITY IN CASES OF FRAUD.** — The fraud which in equity will prevent the running of the Statute of Limitations, is that which is secret or concealed, as distinguished from that which is open, visible, or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action. — *Martin v. Smith*, 85; *O'Brien County v. Brown*, 588.
5. **WHEN IT BEGINS TO RUN.** — Even in cases of fraud, the statute will, in equity, begin to run as against the plaintiff when he has knowledge or information of facts which reasonably creates the belief that the transfer is fraudulent, and can be proved to be so; and if, under all the circumstances, the plaintiff has been guilty of negligence in discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced. — *Martin v. Smith*, 85.
6. **LIMITATION OF ACTION — FRAUD — NOTICE.** — Discovery of fraud, in the meaning of the Statute of Limitations, is not to be imputed to a county simply because it was known to its officer who committed it. — *O'Brien Co. v. Brown*, 588; *Martin v. Smith*, 85.
7. **STATE LIMITATION STATUTE CONSTRUED.** — The statute of Missouri, which provides that "actions for relief on the ground of fraud must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud," construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation. — *Martin v. Smith*, 85.

LIMITATION OF ACTIONS (Continued).

8. *Id.* — A State Statute of Limitation relating to causes of action accruing *beyond* the limits of the State, and in terms commencing to run from the time the cause of action *accrued*; *held*, not to commence running in favor of a defendant until he became a resident of the State. — *Sohn v. Waterson*, 538.
9. DOES NOT APPLY, WHEN. — In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was *continuous*, and the debtor remained down to the time suit was brought the real owner of the property sought to be recovered, and in possession of it; *held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before the suit was commenced. — *Id.*
10. REPEAL—REVIVAL OF CAUSE OF ACTION. — Cause of action fully barred, not revived by the subsequent repeal of the limitation statute. — *Id.*
11. WRITTEN ACKNOWLEDGMENT. — The Statute of Kansas respecting the written acknowledgment, required to take a case out of the Statute of Limitations, construed and applied. — *Barlow v. Barner*, 418.
12. SUSPENDED BY THE REBELLION. — The late civil war had the effect to suspend the Statute of Limitation in cases where the creditor resided in an insurrectionary State and the debtor in a State which adhered to the Union. — *Brown v. Hiatt*, 372.
13. *Id.* — Such a case not distinguishable from one where, as in *Hanger v. Abbott*, 6 Wall. 582, the creditor resided in a loyal State. (*Arguendo*, per DILLON, Circuit Judge.) — *Id.*
14. *Id.* — The time is suspended during the war, although the Statute of Limitation had begun to run *before* the war began. — *Id.*
15. *Id.* — Act of June 11, 1864 (13 U. S. Stats. 123), commented on. — *Id.*
16. POLICIES OF INSURANCE. — Special limitation clauses in, are valid. — *Insurance Co. v. Stanchfield*, 424.
17. APPLICATION OF PAYMENTS. — Where not restricted the creditor has the right to apply payments so as to prevent the bar of the Statute of Limitations. — *Jackson v. Burke*, 311.
18. BANKRUPT ACT. — Special limitation clauses construed. See BANKRUPT LAW.
19. Kansas limitation statute construed. See KANSAS CODE AND STATUTES.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION — ACTION FOR DAMAGES. — Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond. — *Preston v. Cooper*, 589.
2. *Id.* — EVIDENCE — PROOF. — To sustain an action at common law for maliciously suing out an attachment, it is not enough to show merely that the writ was wrongfully sued out because there was no debt due. The plaintiff must show malice, want of probable cause, and damage. — *Id.*

MANDAMUS. See MUNICIPAL CORPORATION.

1. AGAINST PUBLIC CORPORATION. — Writs of mandamus, under the laws of Iowa, are appropriate process to enforce judgments against public corporations; and when issued by the courts of the United States, their execution cannot lawfully be interfered with by the State courts. — *Lansing v. County Treasurer*, 522.
2. POWER TO APPOINT MARSHAL TO COLLECT TAXES. — If writs of mandamus issued by the federal courts in Iowa, commanding the proper local officers to levy and collect taxes to pay judgments against public corporations are evaded, disobeyed, or cannot be executed, the court has the power to appoint its marshal to execute the writs. — *Id.*, note; *Welch v. Ste. Genevieve*, 180.

MANDAMUS (Continued).

8. **Id.**—This is a discretionary authority in the court, and the rules or circumstances which will guide the court in exercising it, considered. — *Id.*

MARRIED WOMAN. See ACKNOWLEDGMENT.

Construction of statute of Minnesota as to mode of barring dower and conveying real estate. — *Drury v. Forter*, 460.

MASTER OF VESSEL. See ADMIRALTY.**MILITARY OFFICER.**

1. **POWER TO ARREST FOR FRAUD ON GOVERNMENT.**—A major-general in command of an army in the field in the Indian country may lawfully issue an order to arrest a person therein who has induced friendly Indians to steal cattle for him, with a view to turn such cattle over to the government under contracts to supply the army with beef; and the fraudulent possessor of such cattle cannot recover for them against the officer who, for such reasons, ordered their seizure. — *Holmes v. Sheridan*, 851.
2. **POWER OF MILITARY COMMANDER TO TAKE PRIVATE PROPERTY UNDER URGENT NECESSITY.**—A military commander, under circumstances of actual, urgent, and immediately pressing public necessity, may justify the taking of the private property of the citizen; in which case the citizen must look alone to the government for compensation. The existence of such necessity is a question for the jury, and must be clearly established by the party who alleges it. — *Id.*
3. **ARREST OF CONTRACTOR FOR FRAUD—SPEEDY TRIAL.**—Army contractors, their agents and assignees, or employees in the course of the execution of their employment, are subject to the rules and articles of war, and are liable to arrest by the military commander for frauds against the government under their contracts; but the officer making arrests must proceed, with reasonable diligence, to have the person arrested brought to trial. — *Id.*
4. **PERSONAL LIABILITY OF MILITARY COMMANDERS—DAMAGES.**—Rules governing the measure of damages in actions against an officer for false imprisonment, stated. — *Id.*
5. **DAMAGES.**—Rules respecting the measure of damages in an action against the officer for false imprisonment. — *Berry v. Fletcher*, 67.
6. **PERSONAL LIABILITY.**—*Clark v. Dick*, 8; *Berry v. Fletcher*, 67; *Holmes v. Sheridan*, 851.

MINNESOTA STATUTES CONSTRUED.

1. **CONVEYANCE BY MARRIED WOMAN.**—Acknowledgment not conclusive of facts therein stated. — *Drury v. Foster*, 460.
2. **Id.**—Under the statute of Minnesota, a married woman can pass her real estate or bar her dower only by executing and acknowledging the deed; and a deed void when acknowledged by the wife by reason of containing material blanks, cannot be ratified by subsequent consent on her part, unless given in accordance with the statute; viz., by a re-acknowledgment of the instrument. — *Id.*
3. **MORTGAGE OF CHATTELS.**—Not required to be under seal. If made under seal by one partner, the co-partner may give his parol assent thereto. — *Hawkins v. Bank*, 462.
4. **Id.**—**POWER OF SALE.**—Authority to the mortgagor to sell as agent of the mortgagee to pay the debt, and not for his own use, is not invalid on its face, nor inconsistent with the statute of the State of Minnesota. — *Id.*
5. **Rules of circuit court for Minnesota district. See APPENDIX.**

MISSOURI.

1. CIRCUIT COURT. — Constitution for Missouri districts. — *In re Circuit Court*, 1.
2. ACT OF OBLIVION. — In Missouri constitution for acts done under military authority during the rebellion. — *Clark v. Dick*, 8.
3. ESTATES OF DECEDENTS. — Plea of a *plene administravit* not a good plea under the Missouri statutes. — *Covington v. Burnes*, 16.
4. FRAUDULENT CONVEYANCE. — Statute of State construed. — *Allen v. Massey*, 40; *Martin v. Smith*, 85.
5. HOMESTEAD ACT. — Construed. — *In re Beckerford*, 45.
6. OUSTING ORDINANCE. — Effect on municipal officers and corporations. — *Welch v. Ste. Genevieve*, 130.
7. CHARTER OF BOATMAN'S SAV. INSTITUTION. — As to rate of interest. — *Darby's Trustees*, 141.
8. Rules of court for Missouri districts. See APPENDIX.

MORTGAGE. See BANKRUPT LAW; INSURANCE; MINNESOTA STATUTES.

Under rule 92 adopted by the supreme court, the power of the circuit court, in suits for the foreclosure of mortgages, to order a general execution for any balance remaining after the sale of the mortgaged premises, is a discretionary one; and the court in one case refused to enter such an order where the complainant, by reason of his delay, was not entitled to it under the State statute; but it granted such an order in another case, although under the State statute an action at law on the notes was barred. — *Phelps v. Loyhed*, 512.

MUNICIPAL CORPORATION. See JUDGMENT; MANDAMUS.

1. CHARTERS — JUDICIAL NOTICE. — *Charters* will be judicially noticed. — *Fauntleroy v. Hannibal*, 118.
2. And public statutes. — *Railroad Co. v. Otoe Co.*, 388.
3. MUNICIPAL CORPORATION — NOT DISSOLVED BY FAILURE TO ELECT OFFICERS. — A municipal corporation, created by legislative act for public purposes, is not dissolved by its failure to elect officers. — *Welch v. Ste. Genevieve*, 130.
4. RELATION OF OFFICERS TO CORPORATION. — The officers of our municipal corporations do not, in the sense of the English books, constitute an *integral part* of the corporation, but are the mere agents or servants of the corporate body. (*Arguendo* by the circuit judge.) — *Id.*
5. MUNICIPAL CORPORATION — DISSOLUTION FOR NON-USER OF FRANCHISE. — Municipal corporations cannot be dissolved by the courts for non-user, or misuser of their powers or franchises. (*Arguendo* by the circuit judge.) — *Id.*
6. MUNICIPAL CORPORATIONS — RIGHTS OF CREDITORS — MANDAMUS TO COLLECT TAX. — Where a judgment existed against a municipal corporation, having no property on which an execution could be levied, and whose duty it was to levy and collect a special tax to pay the judgment, and where the corporation was without officers and would not exercise the powers it had to supply itself with officers, the court appointed its *marshal a special commissioner to assess, levy, and collect the requisite tax*; but suspended the execution of the order so as to allow the corporation time to elect officers, and itself to levy and collect the tax. — *Id.*
7. MISSOURI OUSTING ORDINANCE CONSTRUED. — The *Ousting Ordinance* passed by the constitutional convention of Missouri, and the general incorporation act of that State, in relation to towns, construed. — *Id.*
8. When equity will not enjoin collection of judgment at law against a municipal corporation. — *Muscatine v. Railroad Co.*, 536.
9. That the State courts cannot interfere with the federal courts in enforcing the collection of taxes to pay judgments against municipalities. — *Lansing v. County Treasurer*, 522; *Muscatine v. Railroad Co.*, 536.

MUNICIPAL CORPORATION (Continued).

10. **MUNICIPAL BONDS ISSUED FOR RAILROAD STOCK—VALIDITY.**—A *bona fide* holder of the negotiable bonds of a municipal corporation having express and unrestricted authority to issue them, may recover thereon, although made payable at an earlier date than directed in the ordinance of the city relating to the mode of executing them. — *Gilchrist v. Little Rock*, 261.
11. **ID.**—The federal court in an action by the *bona fide* holder of negotiable bonds issued by a municipality of the State under express legislative authority, declined, under the circumstances and for the reasons stated, to overthrow, at the instance of the defendant, the legislative act, on the ground that it was in conflict with the State constitution. — *Id.*
12. **MUNICIPAL CORPORATIONS—MANDAMUS TO ENFORCE JUDGMENT AGAINST.**—Writs of mandamus under the laws of Iowa are appropriate and proper process to enforce judgments against public corporations; and when issued by the courts of the United States, their execution cannot lawfully be thwarted, or interfered with by the State courts. — *Lansing v. County Treasurer*, 522.
13. **ID.—MARSHAL OF FEDERAL COURT AS COMMISSIONER TO COLLECT TAXES.**—If writs of mandamus issued by the federal courts in Iowa, commanding the proper local officers to levy and collect taxes to pay judgments against public corporations are evaded, disobeyed, or cannot be executed, the court has the power to appoint its marshal to execute the writs. (See *Welch v. Ste. Genevieve*, ante, 180.) — *Id.*
14. **ID.—DISCRETIONARY AUTHORITY IN COURT.**—This is a discretionary authority in the court, and the rules or circumstances which will guide the court in exercising it, considered. — *Id.*
15. **TAXES—DISCRIMINATION AGAINST JUDGMENTS TO PAY RAILROAD BONDS—OBLIGATION OF CONTRACTS.**—An act of the Iowa legislature, discriminating specially against taxes levied to pay judgments upon railroad bonds, was held, in view of the laws in force when the bonds were issued, to be in contravention of the provision of the constitution prohibiting States from passing laws "impairing the obligation of contracts." — *Id.*
16. **DEFENSES.** — *Muscatine v. Railroad Co.* 536.
17. **ID.—CONDITIONS PRECEDENT—HOW DECLARED ON.**—A *bona fide* holder of negotiable bonds of a public corporation authorized to issue them by a public act, need not allege in his declaration the election or other facts showing a compliance with the conditions on which the issue of the bonds is authorized. — *Railroad Co. v. Otse County*, 838.
18. **ID.—DECLARATION.**—The declaration on coupons need not set out a copy of the bonds. — *Id.*
19. **Rate of interest.** — *Rogers v. Lee Co.* 529.
20. **Nature of warrants issued by counties.** — *O'Brien Co. v. Brown*, 588.
21. **LIABILITY FOR DEFECTIVE STREETS.—NOTICE.**—In an action against a city for an accident caused to the plaintiff by reason of a dangerous excavation in one of its public and frequented streets, the character of the excavation and of the street as described in the declaration, and the express allegation of carelessness on the part of the city in respect thereto, were held on demurrer to show a *prima facie* liability, without a distinct allegation that the city had notice of the defect in the street which caused the injury. — *Serrot v. Omaha City*, 312.
22. **LIABILITY.**—Author of dangerous nuisance on public streets also liable to the party injured, and liable over to the city corporation if it is compelled to pay the damages. — *Ware v. Water Co.*, 465, note.
23. **MUNICIPAL CONTROL OVER STREETS.**—Under the statutes of Kansas a railroad company is forbidden to construct and operate its roads upon the streets of an incorporated city "without the assent of the corporate authorities." — *Pacific Railroad Co. v. Leavenworth City*, 898.

MUNICIPAL CORPORATION (Continued).

24. **STREETS—USE BY RAILROAD COMPANY—CONDITIONS.**—Under this statute the city authorities are not limited to a simple granting or denial of the right of way, but they may prescribe conditions on which they will give their assent, and if these are lawful and proper and are accepted by the railroad company, they are binding upon the parties. — *Id.*
25. **Id.**—Accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of the city, and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made. — *Id.*
26. **REMEDY OF MUNICIPALITY.**—An ordinance and contract, special in their terms, construed to give the city a right to re-enter and take possession of the street and remove the railroad track on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. — *Id.*
27. **Id.**—**INJUNCTION.**—The principles, which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company, considered. — *Id.*
28. **Id.**—**NUISANCE—CONTRACTOR.**—Where a person or corporation is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, there is a liability on the part of the person or corporation doing the work for injuries resulting from carelessness or negligence, though the work be done by a contractor, and though the contractor be not an unskillful or improper person. — *Ware v. St. Paul Water Co.*, 465.
29. **Id.**—**NEGLIGENCE—REASONABLE CARE.**—Where in such cases, the work is a lawful undertaking, the jury must be satisfied that the plaintiff was using reasonable care, and that the defendant was negligent. — *Id.*
30. **MUNICIPAL CHARTERS JUDICIALLY NOTICED.**—The courts will judicially notice powers of a public nature conferred upon a municipal corporation, created by legislative act, though the act is not in terms declared to be public. — *Fauntleroy v. Hannibal*, 118.

NAVIGABLE WATERS. See ADMIRALTY ; CONSTITUTIONAL LAW ; INJUNCTION.

The protection, improvement, and general control of the navigable waters of the United States are within the constitutional competency of Congress, and when the federal power is called into exercise, it is paramount and exclusive, and cannot be interfered with by the States. — *United States v. Duluth*, 469.

NEBRASKA.

1. Jurisdiction over Indians within the State limits. — *United States v. Yellow Sun*, 271.
2. Attachment act in the federal court. Construction. — *Garden City Co. v. Smith*, 305.
3. State statute as to substitution of real in place of official party. — *Beecher v. Gillett*, 308.
4. Limitation statute construed. Effect of part payment. — *Jackson v. Burke*, 311.
5. State may tax Union Pacific Railroad Company. — *Union Pacific Railroad Co. v. Lincoln County*, 314.
6. Railway aid legislation. — *Railroad Co. v. Otoe County*, 333.
7. Rules of Court for Nebraska District. See APPENDIX.

NEGLIGENCE. See ACTION ; DAMAGES ; MUNICIPAL CORPORATION ; RAILROAD.

1. **DANGEROUS WORKS.**—Where a person or corporation is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, there is a liability on

NEGLIGENCE (Continued).

the part of the person or corporation doing the work for injuries resulting from carelessness or negligence, though the work be done by a contractor, and though the contractor be not an unskillful or improper person. — *Ware v. Water Co.*, 465

2. **ID. — ELEMENTS OF LIABILITY.** — Where, in such cases, the work is a lawful undertaking, the jury must be satisfied that the plaintiff was using reasonable care, and that the defendant was negligent. — *Id.*
3. For gross negligence, exemplary damages may be given. — *Beale v. Railway Co.*, 568.

NOTARY PUBLIC.

His signature to a notice of protest, otherwise sufficient and duly received, valid, although in print. — *Spalding v. Krutz*, 414.

NUISANCE. See ACTION; MUNICIPAL CORPORATION; NEGLIGENCE.

NUISANCE FROM DEFECTIVE STREETS — LIABILITY. — The author of a dangerous nuisance on the public streets of a city is liable for the damages it occasions, as well as the city corporation. — *Ware v. St. Paul Water Co.*, 465.

OFFICER. See MILITARY OFFICER; MUNICIPAL CORPORATION.

1. **OUSTING ORDINANCE OF STATE OF MISSOURI.** — The *Ousting Ordinance* passed by constitutional convention of Missouri, and the general incorporation act of that State, in relation to towns, construed. — *Welch v. Ste. Genevieve*, 130.
2. Resisting officer. — *United States v. Smith*, 212.
3. Officers *de jure* and *de facto*. — *Schenck v. Peay*, 267; *Welch v. Ste. Genevieve*, 130.
4. Powers of tax commissioners under Act of Congress of August 5, 1861. — *Schenck v. Peay*, 267.
5. Board must be full in order that majority may do valid acts. — *Id.*
6. **PUBLIC OFFICERS — COMPENSATION — RECEIVER OF PUBLIC MONEY.** — A receiver of public moneys is not entitled to offset against the government, rejected accounts for unauthorized clerk hire, fuel, lights, or for transmitting money. Office rent may under extraordinary circumstances be allowed. — *United States v. Lowe*, 585.

PARTIES.

1. In bankruptcy. See **BANKRUPT LAW**.
2. In equity. See **EQUITY**.
3. In patent cases. See **PATENTS FOR INVENTIONS**.
4. **REAL PARTY IN INTEREST.** — An assignee of the assured, after loss, of the whole amount due "on a policy of insurance," is the real party in interest, and competent, under the Kansas Code, to sue in his own name. — *Spratley v. Insurance Co.*, 392.
5. **ID.** — Construction of State practice act as to real party in interest. — *Perkins v. Ingersoll*, 417.
6. **PARTIES — MISJOINDER — EQUITY PRACTICE.** — If one who has no interest in the subject-matter of the suit, or in the relief prayed, be joined as party plaintiff, the defect may be reached by a general demurrer for want of equity. — *Hodge v. N. M. R. R.*, 104.

PARTNER. See **BANKRUPT LAW**.

1. Right of individual and firm creditors under the bankrupt act. — *Downing's Case*, 33; *Patrick v. Central Bank*, 303.
2. Partner may give parol assent to an instrument, under seal, executed by his co-partner, where a seal is not necessary, to its validity; as, for example, in Minnesota, a mortgage of chattels. — *Hawkins v. Bank*, 462.

PATENTS FOR INVENTIONS. See EQUITY.

1. PARTIES IN INJUNCTION BILLS—NEXT OF KIN—PERSONAL REPRESENTATIVE.—The next of kin of a patentee cannot be united as parties plaintiff with the personal representative, in a bill to enjoin the infringement of the rights secured by the patent, and for an accounting.—*Hodge v. North Missouri Railroad Co.*, 104.
2. ID.—Upon the death of the inventor, the title to the patent issued passes to the personal representative at the domicil of the patentee, who may sue for an infringement in any of the courts of the United States having jurisdiction. It is not necessary that letters should be taken out in the State in which the suit is brought.—*Id.*

PAYMENT. See COLLATERAL SECURITY; JUDGMENT.

1. BY ONE JOINT DEBTOR.—Payment of a judgment by one joint defendant satisfies it, and the assignee thereof cannot afterward recover thereon against the other debtors.—*Arnott v. Webb*, 362.
2. ACCEPTING COLLATERALS IN PAYMENT.—An agreement to this effect must be established by the party who alleges it.—*Brown v. Hiait*, 372.

PLEADING. See ABATEMENT; ACTION; CONSTITUTIONAL LAW; CRIMINAL LAW; EQUITY; EXECUTOR.

GENERAL DENIAL.—REAL PARTY IN INTEREST.—The Code of Kansas construed in these respects.—*Perkins v. Ingersoll*, 417.

POLICY OF INSURANCE. See INSURANCE.

PRACTICE AT LAW.

1. PRACTICE OF SUPREME JUSTICE ON THE CIRCUIT.—The justice of the supreme court sitting alone in the circuit court, will not review and set aside an order or judgment made by the district judge, when the latter was alone holding a term of the circuit court; and MR. JUSTICE MILLER added that he had "prescribed it as a rule of conduct for himself, that the presence of the district judge, and his consent to a review of his decision, would not vary the course to be pursued."—*Appleton v. Smith*, 202.
2. ID.—Accordingly, MR. JUSTICE MILLER, holding the circuit alone, overruled a motion to quash an attachment levied on goods, *solely* because a motion involving the same legal proposition was overruled at the preceding term, by the district judge, who then held the court.—*Id.*
3. PRACTICE—PARTIES--OBJECTION, WHEN MAY BE TAKEN.—The objection that the plaintiff is not the real party in interest, and therefore not entitled to sue, cannot be taken for the first time after the evidence on the trial is closed.—*Perkins v. Ingersoll*, 417.
4. EVIDENCE—READING PAPERS TO JURY.—A judgment will not be reversed because papers recognized on the trial in evidence were not *formally* read.—*Andrews v. Graves*, 108.
5. RIGHT TO USE DEPOSITION.—Under circumstances stated, it was held that the district court did not err in allowing a deposition taken and filed by one party to be read in evidence by the other.—*Id.*
6. ENTIRE CHARGE VIEWED.—The court will look at the entire charge to the jury, in order to ascertain whether the law was, upon the whole, fairly presented to them.—*Id.*
7. Dates fixed by the records of the court may be stated to the jury as facts.—*Id.*
8. Consolidation of actions.—*Holmes v. Sheridan*, 351.
9. Practice in causes removed from the State court.—*McBratney v. Usher*, 367; *Garden City Co. v. Smith*, 305.
See REMOVAL OF CAUSES.

PRACTICE AT LAW (Continued).

10. Practice of supreme justice on circuit. — *Appleton v. Smith*, 202.
11. Appeals and review in bankruptcy cases. — *Hawkins v. Hastings Nat. Bank*, 453.
12. Practice in criminal cases. See ABATEMENT; CRIMINAL LAW.

PRINCIPAL AND AGENT. See AGENT; INSURANCE.

PROMISSORY NOTE. See BILLS AND NOTES.

PUBLIC LANDS. See LAND OFFICE RECEIVER.

1. PRE-EMPTION ACT—ASSIGNMENT BY PRE-EMPTIONER. — Under the Act of Congress of September 4, 1841 (5 U. S. Stats. 453), relating to pre-emption of the public lands, and which in the twelfth section provides that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," a pre-emptioner, although he has a certificate of purchase, cannot, it seems, prior to the issue of the patent, convey the land. — *Kellom v. Easley*, 234.
2. CONVEYANCE BY PRE-EMPTIONER BEFORE PATENT ISSUED. — A conveyance made by a pre-emptioner before patent issued, and where his entry was set aside and no patent ever issued to him, was held to be incapable of operating, either by way of grant or estoppel. — *Id.*
3. BILL OF REVIEW—WHAT NECESSARY TO BE STATED. — A bill of review should state the former proceedings, and wherein the party exhibiting it considers himself aggrieved; the sufficiency of allegations in this respect considered and decided. — *Id.*
4. PUBLIC LANDS—LOCATION EQUIVALENT TO PATENT. — The location of land with scrip, under and in compliance with the Act of Congress of July 17, 1854, passed the fee out of the United States and was equivalent to a patent. — *Larrieviere v. Madegan*, 455.
5. EJECTMENT—EQUITABLE TITLE. — In ejectment the defendant cannot, in the courts of the United States, set up an equitable title. — *Id.*
6. PUBLIC LANDS—HOT SPRINGS RESERVATION—PUBLIC POLICY. — Congress specially reserved the tract of land on which the "Hot Springs" were situated from sale, "for the future disposal of the United States," and declared in the act that the same "should not be entered, located, or appropriated for any other purpose whatever." Held, that the lands thus reserved became segregated from the public domain, and could not be lawfully settled upon, and that a "squatter" thereon could not recover against his lessee *ground rent* for the use of such lands, because such lease was void by reason of being in violation of the above-mentioned statute, and against public policy, and the lessee was not estopped to deny his landlord's title. — *Dupas v. Wassell*, 213.
7. IMPROVEMENTS ON PUBLIC LANDS SALEABLE. — Such a case is distinguishable from those which hold that *improvements* made upon public lands may be sold, and that the sale constitutes a good consideration for a promise to pay therefor. (Per CALDWELL, J., *arguendo*.) — *Id.*
8. Indian lands and reservation. See INDIANS; TAXES.

PUBLIC OFFICERS.

Compensation of, and allowances to, public officers of the United States. — *United States v. Lowe*, 585.

RAILROAD. See DAMAGES; MUNICIPAL CORPORATION; NEGLIGENCE.

1. GROSS NEGLIGENCE—EXEMPLARY DAMAGES. — Exemplary damages may be awarded against a railway company for an accident which happens in consequence of the gross negligence or drunkenness of their servants. — *Beale v. Railway Co.*, 569.

RAILROAD (Continued).

2. **SPECIFIC PERFORMANCE OF RAILWAY CONTRACTS.** — The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for its road, to erect the necessary buildings, and to build the bridges, etc., and were to be paid in mortgage bonds and stock, but the complainants (in consequence as alleged, of defendant's fault) had not entered upon the work; the road-bed to be graded and prepared by the company was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors, seeking to enjoin the company from making a contract with others to iron and equip the road, and praying a *specific execution* of their contract with the company, and refused to retain the bill for compensation. — *Fallon v. Railroad Co.*, 121.
3. **CORPORATION — CONSTRUCTION OF PREFERRED STOCK CERTIFICATE.** — Preferred stock certificates issued by the railroad company, construed, and held to give the holders thereof a preferable right to the first seven per cent of the net earnings each year; after which the holders of common stock are entitled to next seven per cent, and if any surplus it is to go to holders of the preferred and common stock equally. — *Bailey v. The Hannibal & St. Joseph R. R. Co.*, 174.
4. **TAXATION — UNION PACIFIC RAILROAD COMPANY.** — This company is taxable by the States through which it operates its road. — *Union Pacific Co. v. Lincoln Co.*, 314.
5. **RAILWAY CORPORATION.** — Nature of its franchises; what alienable, and what not. — *Id.*
6. **OCCUPATION OF STREETS.** — Occupation of city streets by the track of a railroad company. — *Railroad Co. v. Leavenworth*, 393.
7. **COMMON CARRIER — LIMITATION OF LIABILITY.** — A contract between a railway company and the shipper of goods, limiting the common-law liability of the company as a carrier, will have no greater operation given to it than the language used plainly shows the parties must have intended that it should have. — *Menzell v. Railway Co.*, 531.
8. **Id. — SPECIAL CONTRACT CONSTRUED.** — A special contract of this character construed; and held not to exempt the company for a *total loss* of the goods by fire, while in the *warehouse of the company*, at an *intermediate station*, on the line of transportation. — *Id.*
9. **INJURY TO PERSONS ON TRACK — LIABILITY.** — A railroad company, whose train is approaching a man walking lengthwise upon its track, which ring its bell and sounds its whistle in time to enable him to get off, is not liable for an injury which happens to him under such circumstances. — *Fin'ayson Railroad Co.*, 579.
10. **Id.** — The duties and liabilities, under such circumstances, of the company on the one hand, and of the person injured on the other, stated by MR. JUSTICE MILLER. — *Id.*
11. **Taxation of railroad companies.** See TAXES AND TAXATION.
12. **DAMAGES.** Liable to punitive damages for gross negligence. — *Beale v. Railway Co.*, 563.
13. **Constitutionality of railway aid legislation, and course of decision in Iowa on the subject, reviewed.** — *King v. Wilson*.

REBELLION. See CONFISCATION ACT; CONSTITUTIONAL LAW; LIMITATION OF ACTIONS; REMOVAL OF CAUSES.

1. **PROOF OF AGREEMENT TO ACCEPT COLLATERALS FOR DEBT.** — A debtor who sets up as a defense that his creditor agreed to accept collaterals held by him in *satisfaction* of his debt, must establish it; and where such an agreement is alleged to be contemporaneous with the creation of the debt, and is not mentioned in the written assignment of the collaterals, and where the collaterals are

REBELLION (Continued).

- less in amount than the debt, it was considered by the court as intrinsically improbable. — *Brown v. Hiatt*, 372.
2. **STATUTE OF LIMITATION — EFFECT OF WAR.** — During the whole period occupied by the late civil war, the complainant, a creditor, resided in an insurrectionary State, and the respondent, his debtor, in a State, which adhered to the Union. *Held*, that the Statute of Limitations of the State in which the debtor resided was *suspended* by the war, and hence, in computing the time which has run, the period during which the war continued is not to be counted. — *Id.*
 3. *Id.* — The time is suspended during the war, although the Statute of Limitations has begun to run *before* the war began. — *Id.*
 4. *Id.* — The case of a creditor living in an insurrectionary State is not distinguishable from one where, as in *Hunger v. Abbott*, 6 Wall. 582, the creditor resided in a loyal State. (*Arguendo*, per DILLON, Circuit Judge.) — *Id.*
 5. *Id.* — **EFFECT OF ACTS OF CONGRESS.** — The Act of Congress of June 11, 1864 (13 U. S. Stats. 123), is not in conflict with the point above stated, respecting the effect of the war on the Statute of Limitations. — *Id.*
 6. *Id.* — The Act of Congress of July 13, 1861 (12 U. S. Stats. 255), construed and regarded as contemplating (upon the issue of the proclamation therein authorized), a condition of entire non-intercourse of a pacific character between the inhabitants of the opposing sections, except such as should be authorized by the President; one effect of which legislation was to suspend the remedy and the right to sue upon all contracts, irrespective of the fact whether the creditor residing in the insurrectionary State was, or was not, in sentiment and acts opposed to the rebellion, (*Arguendo*, per DILLON, Circuit Judge.) — *Id.*
 7. *Id.* — **APPLICATION TO CIVIL WAR.** — The late conflict was a civil war, and was attended with the usual and general incidents of such a war. (*Arguendo*, per DILLON, Circuit Judge.) — *Id.*
 8. **STATE STATUTES OF LIMITATION IN FEDERAL COURTS.** — State Statutes of Limitation, where Congress has not otherwise specially provided, form rules of decision in the national courts, which will give to them the same effect that they have, or are entitled to, in the courts of the State enacting them. (*Arguendo*, per DILLON, Circuit Judge.) — *Id.*
 9. **HOLDER OF COLLATERAL — LIABILITY FOR LOSS.** — The holder of a collateral security is not liable for a loss occurring without his fault; nor is he liable for neglecting to sue or look after the security when the person from whom it was received was, by the understanding of the parties, to do this. — *Id.*
 10. **CONFISCATION OF COLLATERAL SECURITIES — EFFECT.** — Where a collateral security was confiscated under the statute of July 12, 1862 (12 U. S. Stats. 589), because of acts charged against the creditor holding such collateral, and the confiscation proceedings are valid on their face, and have never been set aside or directly assailed. *Held*, that in stating an account between the parties, who were mortgagor and mortgagee, the latter should be charged with the full value of the note so confiscated as his property. — *Id.*
 11. **CONFISCATION ACTS — VALIDITY OF DECREE — COLLATERAL ATTACK.** — A decree condemning property under the confiscation act, where the record of the proceeding shows that a libel of information was duly filed, and a writ of monition issued, and a return of service that the *res* has been attached, is not void on its face, and cannot be collaterally assailed in a bill to foreclose by evidence that the *res* was always in the possession of the complainant, and hence the marshal's return was not true, and therefore, as there was no seizure, the confiscation proceeding was without jurisdiction, and void. — *Id.*
 12. **INTEREST — NOT ALLOWED DURING WAR.** — Interest, for special equitable reasons, disallowed during the war to a creditor residing in an insurrectionary State. — *Id.*

REBELLION (Continued).

13. **REBELLION — DURATION IN TEXAS.** — From the nature of the question, which is regarded as political and not judicial, from the fair implication of the acts of Congress, and from the uncertainty and confusion which would ensue from any other rule: *Held*, that in contemplation of law the late rebellion continued in existence, in the State of Texas, until it was declared to be at an end, by the President in his proclamation of August 20, 1866 (14 U. S. Stats. 814); and that the courts would not inquire as a matter of fact in each case when the rebellion terminated, or hostilities ceased, but would be governed in determining it by the decision of the political department of the government. — *Phillips v. Hatch*, 571.
14. **CONTRACTS MADE DURING PENDENCY OF REBELLION.** — A contract made without any license or authority from the government, during the pendency of the rebellion, between a resident of a State in insurrection and a State which "maintained a loyal adhesion to the Union," is void, both by the doctrines of international or public law, applicable to the late civil conflict, and by force of express legislative declaration. — *Id.*
15. *Id.* — Even after the war has terminated, the defendant in an action founded upon such a contract may plead the illegality thereof as a defense. — *Id.*
16. **CIVIL WAR — LAWS APPLICABLE TO.** — The principles of public law applicable to a state of war *inter gentes* have in general, in the absence of conflicting congressional legislation, been applied to legal questions arising out of the civil war between the United States and the so-called confederate government. — *Id.*
17. *Id.* — Various statutes of Congress, and proclamations of the President relating to the *status* of the insurrectionary States, cited and commented on by DILLON, Circuit Judge. — *Id.*

RECEIVE

Effect of appeal and supersede as bond on property in hands of a receiver. — *Schenck v. Peay*, 267.

RECEIVER OF PUBLIC MONEY.

Compensation of local land office receiver; statutes construed. — *United States v. Lowe*, 585.

RECOGNIZANCE. See CRIMINAL LAW.

REVIEW, BILL OF. See EQUITY.

Requisites of such a bill. — *Kellom v. Easley*, 281.

REMOVAL OF CAUSES. See CONSTITUTIONAL LAW; LIMITATION OF ACTIONS.

1. **ACTS OF CONGRESS.** — The various acts of Congress relating to the removal of causes from the State to the federal courts, discussed by TREAT, J.: *Sweeney v. Coffin*, 73; and by DILLON, Circuit Judge: *Sands v. Smith*, 290.
2. **REMOVAL UNDER JUDICIARY ACT — PRACTICE.** — Party removing must file in the federal court not only a copy of the summons, but of the declaration or bill, the petition for the removal, and the order of removal, if any was made, by the State court. — *McBratney v. Usher*, 367.
3. **PRACTICE.** — In causes thus removed, stated. — *Id.*
4. **PETITION — VERIFICATION — WHEN TO BE FILED — APPEARANCE.** — Under the provisions of the *judiciary act*, where application is made to remove a cause from the State court to the United States circuit court on account of the citizenship of the parties, it is *not necessary* that the *petition* filed for that purpose should be verified by affidavit. — *Sweeney v. Coffin*, 73.

REMOVAL OF CAUSES (Continued).

5. The filing of the petition for removal is a sufficient *appearance* to the suit to give the court jurisdiction of the person; and the question as to citizenship of the parties can be raised in the United States court. — *Id.*
6. If the party fail to file a petition for removal at the *time of entering his appearance*, he will be precluded from doing so at any subsequent stage of the proceedings. — *Id.*; *Webster v. Crothers*, 801; *McBratney v. Usher*, 867.
7. PLEADING IN STATE COURT. — In cases removable under section 12 of the judiciary act, the defendant is not in default for not pleading in the State court. — *Webster v. Crothers*, 801; *McBratney v. Usher* (*arguendo*), 867.
8. AFFIDAVIT TO PETITION — WHEN NECESSARY. — Under the Acts of 1833, March 3, 1863, July 27, 1863, March, 2, 1867, the petitions for removal *must be verified by affidavit*. (Per TREAT, J., *arguendo*.) — *Sweeney v. Coffin*, 73.
9. Requisites of affidavit under Act of March 2, 1867. — *Sands v. Smith*, 290, *note*.
10. Under Act of July 27, 1866, defendants may apply *separately* for a removal. — *McBratney v. Usher*, 872, *note*.
11. ACT OF MARCH 3, 1863. — The Act of Congress of March 3, 1863 (12 U. S. Stats. 755, 757), providing for transfer into the federal courts of suits for certain acts done or omitted during the Rebellion by authority of the President, or any act of Congress, is constitutional, and Congress has the power to regulate the remedy, and to prescribe the period, within which suits must be brought. — *Clark v. Dick*, 8.
12. *Id.* — This statute, by its terms, applies to all cases described therein, and the limitation period extends to and includes cases of the character mentioned in the State courts as well as in the federal courts. (*Arguendo*, per MR. JUSTICE MILLER.) — *Id.*
13. EJECTMENT — REMOVAL BY NON-RESIDENT LANDLORD. — The plaintiff, being a citizen of the State, brought ejectment in the State court against the defendant, also a citizen of the State, who pleaded to the merits, and a third person, a citizen of another State, was, on his own application, made a co-defendant, but filed no plea; and *both* joined in a petition for the removal of a cause to the federal court, stating no facts in relation to the ownership of the land, or their relation to each other, and the court ordered the removal. *Held*, that the cause was improperly transferred. — *Allin v. Robinson*, 119.
14. Distinguished. — *Beecher v. Gillett*, 808.
15. *Id.* — ACT OF JULY 27, 1866. — Whether the non-resident landlord may, in such case, where the title is in dispute, and the resident defendant is a mere tenant, have the cause removed on proper petition, under the Act of July 27, 1866; *quære?* — *Allin v. Robinson*, 119.
16. ACT OF MARCH 2, 1867 — 14 U. S. STATS. 558. — Commented on and construed. — *Sands v. Smith*, 290.
17. REMOVAL BY PLAINTIFF — SEVERAL DEFENDANTS. — A non-resident plaintiff who brings his action at law in a State court against a citizen of the State in which the suit is brought and a citizen of another State, the latter of whom voluntarily appears, is entitled, by complying with the Act of Congress of March 2, 1867, to have the cause removed, as to all the defendants, to the proper circuit court of the United States. — *Id.*
18. ACT OF MARCH 2, 1867 — REMOVAL BY DEFENDANTS. — A non-resident defendant cannot have a removal where a *part* only of the plaintiffs, suing on a joint demand, are residents of the State where the suit was brought. — *Case v. Douglas*, 299.
19. REMOVAL OF ACTIONS WHERE GOODS ARE ATTACHED — PRACTICE. — The circuit court after removal may, where the practice is authorized by State statute, entertain a motion to dissolve the attachment and discharge the property. — *Garden City Co. v. Smith*, 305.

REMOVAL OF CAUSES (Continued).

20. *Id.* — And has, in such circumstances, a discretion to hear such a motion, although a similar motion was denied in the State court. — *Id.*
21. REMOVAL BY DEFENDANTS IN REPLEVIN. — In replevin by a citizen of the State, non-resident creditors were substituted by the State court under the State laws as *sole defendants in lieu of the sheriff*, the original defendant who represented them, and it was held that the non-resident creditors might thereupon have the cause removed to the federal court. — *Reecher v. Gillett*, 303.

RULES OF COURT.

1. Rules of circuit courts in the 8th circuit. See APPENDIX.
2. RULES OF SUPREME COURT. See MORTGAGE.

RESERVATION. See INDIANS; PUBLIC LANDS; TAXES.

REVENUE LAWS. See FORFEITURE; INTERNAL REVENUE.

1. HOW CONSTRUED. — Revenue laws inflicting penalties for their violation are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention. — *United States v. One Hundred Barrels*, 49.
2. Repeal by implication not favored, and only exists when the repugnance is positive. — *Id.*

SLAVERY.

1. SLAVERY — LOCAL INSTITUTION. — The institution of slavery under the constitution of the United States was purely local in its character, and confined to the several States where it existed, and was the creature of positive law, and this is true of all its incidents. — *Osborn v. Nicholson*, 219.
2. FEDERAL CONSTITUTION — SLAVES NOT PROPERTY. — The constitution of the United States did not regard slaves as property, but as persons; and it did not establish slavery, or give any sanction to it, save in the single respect of the return of fugitives from service. — *Id.*
3. STATUTORY REMEDY — VALID THOUGH AGAINST MORALITY. — A remedy on a contract which is against sound morals, natural justice, and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot for any purpose survive its repeal. — *Id.*
4. OBLIGATION OF CONTRACT — PROHIBITION BY STATUTE OF SLAVE CONTRACTS. — The new constitution of Arkansas, declaring that "all contracts for the sale and purchase of slaves were null and void," is not in conflict with the clause of the constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, which clause does not operate so as to perpetuate the institution of slavery or any of its incidents, these being matters over which the States had unlimited control. — *Id.*
5. SLAVE CONTRACTS — EFFECT OF THIRTEENTH AMENDMENT TO THE CONSTITUTION. The thirteenth amendment to the constitution of the United States *ipso facto* destroyed the institution of slavery and all of its incidents, and put an end to all remedies growing out of sales of slaves. — *Id.*
6. *Id.* — THIRTEENTH AND FOURTEENTH AMENDMENTS. — In view of the thirteenth and fourteenth amendments to the constitution of the United States, a remedy on a contract for the sale of slaves is contrary to the spirit of their provisions, against public policy, and cannot be maintained.

SOLDIER. See ARMY ENLISTMENT.

SPECIFIC PERFORMANCE. See EQUITY.

1. At the instance of the contractor, of an executory contract, to construct a railroad, denied. — *Fallon v. Railroad Co.*, 121.
2. Court refused to retain the bill for compensation in damages, and to charge the same as a lien upon the road. — *Id.*

STATE AND FEDERAL RELATIONS. See BANKRUPT LAW; CONSTITUTIONAL LAW; INDIANS; HABEAS CORPUS; INJUNCTION; INSOLVENT LAWS.

STATUTES OF LIMITATION. See LIMITATION OF ACTIONS.

STATUTES. See ACTS OF CONGRESS CONSTRUED, *ante*, 15; BANKRUPT LAW; INTERNAL REVENUE; REVENUE LAWS.

1. Construction of statutes denouncing forfeitures. — *United States v. Distilled Spirits*, 49.
2. Repeal by implication is not favored, and there is no repeal except where the repugnance is clear and positive. — *Id.*

STREETS. See ACTION; MUNICIPAL CORPORATION; NEGLIGENCE.

1. Liability of city corporation for accidents caused by defective streets. — *Serrot v. Omaha*, 312; *Ware v. Water Co.*, 465.
2. Use of by a railroad company. — *Railroad Co. v. Leavenworth*, 393.
3. AUTHOR OF NUISANCE LIABLE. — The author of a dangerous nuisance on the public streets of a city is liable for the damages it occasions, as well as the city corporation. — *Ware v. Water Co.*, 465.
4. *Id.* — Effect of judgment against city corporation on the primary liability of the author of the nuisance. — *Id.*, note.

SUPERSEDEAS BOND.

Effect of appeal and supersedeas bond. — *Schenck v. Peay*, 267.

SUPREME JUSTICE. See CIRCUIT COURT.

TAXES AND TAXATION. See CONSTITUTIONAL LAW; MANDAMUS; MUNICIPAL CORPORATION; RAILROAD.

1. BOARD OF TAX COMMISSIONERS — ACT OF JULY 20, 1868. — The Act of July 20, 1868, declaring that acts performed by any two of the tax commissioners shall have the same effect as if performed by all three, though retrospective, is not therefore repugnant to the constitution. Such act does not give validity to the acts of two commissioners unless three were in office. — *Schenck v. Peay*, 267.
2. OFFICERS DE JURE AND DE FACTO — WHO ARE. — A person appointed to an office without authority, and who never performed an official duty as such officer, is not an officer *de jure* or *de facto*. — *Id.*
3. OFFICE — APPOINTMENT — POWER OF PRESIDENT. — Where an office is created and takes effect during a session of the Senate, and a subsequent session of Congress passes without the same being filled, the President cannot make a valid appointment to such office during a recess of the Senate. — *Id.*
4. VALIDITY OF ASSESSMENT — ACT OF JUNE 7, 1862. — Under the Act of Congress of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, the penalty of fifty per cent could not be assessed on lands at the date of the apportionment of the direct tax. An assessment of the penalty simultaneously with the apportionment was unauthorized, and rendered void a sale for taxes under such assessment and appointment. — *Id.*

TAXES AND TAXATION (Continued).

5. **FORFEITURE FOR NON-PAYMENT OF TAXES.** — Congress may declare a forfeiture for non-payment of taxes that will take effect *ipso jure*. But the courts will not give it such construction unless the intention that such should be the effect clearly appears. — *Id.*
6. **EQUITY—TAX SALE—FRAUD TO SET ASIDE.** — A court of equity will set aside a tax sale where there was fraud and collusion between the officer making the sale and the purchaser. — *Id.*
7. **TAX SALE—REDEMPTION—ACT OF JULY 7, 1862.** — A lien creditor of the owner of the fee is an "owner of the land" in the meaning of the Act of 1862, and for the purpose of paying taxes on the land on which he has a judgment or attachment lien, or for the purpose of redeeming the same from tax sale. — *Id.*
8. **TENDER EQUIVALENT TO PAYMENT.** — A lawful tender of the tax on lands to the officer authorized to receive it is tantamount to an actual payment, and divests the authority of the officer to sell the land for taxes. — *Id.*
9. **TAXATION—POWER OF THE STATES—EXEMPTION OF RAILROADS.** — The interest of the general government in the Union Pacific Railroad Company, though chartered and aided by Congress, is not such as to exempt the company and its property from taxation by a State, through which the road is located and operated. — *Union Pacific Railroad Co. v. Lincoln County*, 814.
10. **ID.—EXEMPTION OF FEDERAL INSTRUMENTALITIES.** — The doctrine of the implied exemption of federal instrumentalities from State taxation, considered and applied to this corporation, and the result reached, that it is not such an instrumentality; and if, in any case, it is such, the paramount rights of the government would not be affected, and, under the acts of Congress, could not be injured by any subordinate right of the State to tax and sell the property of the corporation. — *Id.*
11. **POWER OF STATES—TAXATION OF RAILROADS.** — Under the legislation of Nebraska, the county of Lincoln has the right to tax railroads in the unorganized country attached to it for revenue purposes. — *Id.*
12. **TAXATION OF RAILWAY COMPANIES—CONSTITUTIONAL LAW—INJUNCTION—UNIFORMITY OF TAXATION.** — Conceding a statute a State exempting railroad companies from their due proportion of taxation to be unconstitutional, the omission, pursuant to such statute, to tax the property of railroad companies the same as that of individuals, does not render void a tax levied upon the property of others which is liable to taxation; and hence the owner of property properly assessed cannot, on the ground that other property subject to taxation is omitted to be assessed, enjoin the collection of taxes against his own property. — *Muscatine v. Railroad Co.*, 586.
13. **ID.—** Where a State constitution requires all general laws to be *uniform* in their operation, and all laws for the assessment and collection of taxes to be general and of uniform operation throughout the State, and that the property of all corporations shall be subject to taxation the same as that of individuals, *quære* whether it is competent for the legislature to tax railway corporations on their earnings, while the bulk of the other property in the State is taxed upon its value? — *Id.*
14. **ID.—** *Gilman v. Sheboygan*, 2 Black, 510, commented on by MR. JUSTICE MILLER, and the statute in question in that case distinguished. — *Id.*
15. **LANDS IN INDIAN RESERVATION NOT TAXABLE.** — A sale of lands for taxes in Indian reservation not subject to State taxation is void. — *Swope v. Purdy*, 349.
16. **ID.—STATUTE OF LIMITATIONS.** — A State Statute of Limitations is not applicable to a sale of lands exempted by federal authority from State taxation. — *Id.*
17. **ID.—DEED VOID ON ITS FACE.** — Kansas Statute of Limitation does not run against a tax deed void on its face, when no possession is taken thereunder. — *Swope v. Saine*, 416.

TAXES AND TAXATION (Continued).

18. **RELATION OF STATE AND FEDERAL COURTS.**—The federal courts, sitting in a State, follow the latest decision of the highest tribunal of the State, as to validity and construction of a State statute; and the case is an exceptional one in which the federal court is justified in holding a statute void, because in conflict with the constitution of the State after the supreme court of the State has pronounced it to be valid. — *King v. Wilson*, 555.
19. **ID.—CONSTRUCTION OF STATE CONSTITUTION.**—The latest decision of the State supreme court, holding that the citizen might constitutionally be taxed, and the proceeds given as a gratuity or donation to aid in the building of the roads of private railway companies, was followed, although that decision overruled a long and settled course of adjudication by the same tribunal the other way, and the prior decisions were regarded as sound expositions of the constitution of the State. — *Id.*
20. **ID.—RAILROAD AID TAX LAW.**—The case made in the bill involving no contract made upon the faith of the prior decisions of the State court, does not fall within the exception to the rule recognized by the United States supreme court in the Iowa bond cases. (*Gelpcke Case*, 1 Wall. 175; *Butz v. Muscatine*, 8 Wall. 575.) — *Id.*
21. **JURISDICTION—PARTIES—CITIZENSHIP.**—While it may be true that non-resident tax payers, citizens of different States, may join in a bill in equity to enjoin the collection of an illegal tax on their several property, it seems, as to each so entitled to join, that there must be in dispute an amount exceeding five hundred dollars. — *Id.*

TEXAS.

Rebellion ended in August 20, 1866. — *Phillips v. Hatch*, 571.

TRADE-MARK.

1. **TRADE-MARKS—PROTECTION BY INJUNCTION.**—Equity will protect, by injunction, the rights of one who has adopted and appropriated a *trade-mark* to distinguish his goods; and if his rights are invaded, the originator or proprietor of the trade-mark may also recover his damages (ordinarily the loss of profits) from the wrong-doer. — *Hostetter v. Vowinkle*, 829.
2. **UNLAWFUL IMITATION OF TRADE-MARK—WHAT IS.**—The imitation of the trade-mark of another to be unlawful need not be in all particulars exact and complete; it is sufficient if it be of a nature to mislead and deceive; accordingly, an imitation of a manufacturer's label in every respect like the original, except that "Hostetter" was altered to "Holsteter," and the words "Hostetter & Smith," were changed to "Holsteter & Smyte," was held to be illegal, and ground for an injunction and for damages. — *Id.*
3. **TRADE-MARKS—ILLEGAL IMITATIONS—DAMAGES.**—There being proof that the plaintiffs had an established trade in the city where the imitated bitters were made and sold by the defendants, and that their sales fell off, in that place, in an amount at least equal to sales made by the defendants of the imitated article, the court gave the plaintiffs as damages the profits they would have made on the number of bottles which the defendants actually sold of their own manufacture, being satisfied that the plaintiffs' sales had been reduced to that extent by this cause. — *Id.*

TRESPASS.

1. **JOINT AND SEVERAL TRESPASSERS—LIABILITY.**—All who instigate, promote, or co-operate in the commission of a trespass, or aid, abet, or encourage its commission, are guilty. — *Berry v. Fletcher*, 67.

TRESPASS (Continued).

2. **Id.** — But the mere presence of persons at the commission of a trespass which they did not advise or abet, and in which they did not participate and had no interest, will not make them trespassers. — *Id.*
3. **Id.** — **VERDICT OF JURY.** — Where the defendants are sued jointly in trespass, the jury must find a single verdict, and assess damages jointly against such as are proved guilty of the *same* trespass. — *Id.*
4. **Id.** — **DAMAGES.** — In trespass against several, the jury should estimate damages according to the most culpable of the joint trespassers. — *Id.*
5. **DAMAGES EXEMPLARY AND COMPENSATORY.** — All damages are referred by the law either to compensation or punishment. Compensation is to make the party injured whole. Exemplary damages are given, not to compensate the plaintiff, but to punish the defendant. — *Id.*
6. **Id.** — Circumstances stated which will authorize the jury to give exemplary damages. — *Id.*
7. **PRACTICE — TRESPASS AND FALSE IMPRISONMENT — CONSOLIDATION OF CAUSES.** — Where two actions against the same defendants, one for trespass to the person, and the other for trespass to the property, arose out of the same transaction, and might have been joined, the court, instead of ordering them to be consolidated, directed that they be tried at the same time and to the same jury. — *Holmes v. Sheridan*, 351.

TREATY. See MILITARY OFFICER.

An act of Congress may supersede a prior treaty, and the reverse. — *United States v. Tobacco Factory*, 264.

UNION PACIFIC RAILWAY COMPANY.

1. **TAXATION.** — Is taxable by the States. — *Union Pacific Railroad Co. v. Lincoln County*, 314.
2. **NATURE OF THIS CORPORATION.** — The corporation is private as respects its ownership, but sustains public relations of a peculiar character to the general government, the nature of which are stated. — *Id.*

USAGE. See INSURANCE.

As affecting compensation of life insurance agent for renewals of policies after the agency ceases. — *Partridge v. Life Ins. Co.*, 139.

USURY. See BANK.

1. When usurious interest may be recovered back. — *Darby's Trustees*, 141, 151.
2. Remedy in equity — not alone at law. — *Id.*

WAREHOUSE. See RAILROAD COMPANY.**WITNESS.**

1. Competency of parties. See **EVIDENCE**.
2. Competency of wife. See **BANKRUPT LAW**.
3. **WITNESS FEES — ATTACHMENT OF WITNESS.** — A witness in a civil cause in the United States courts, who, at the time of the service of the subpoena, demands his traveling fees and his fee for one day's attendance, cannot be attached for contempt, if he fails to obey the writ. — *In re Thomas*, 420.
4. **Id.** — **MILEAGE.** — Mileage of witness. See note, *infra*. — *Id.*

WRIT.

WRIT OF ASSISTANCE. — Function of writ and its issue limited to parties and privies. — *Thompson v. Smith*, 458.

